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Elizabeth P. Formby

Marc S. Raspanti

Kathryn E. Rooney

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## ARTICLES

# WHY DO THEY DO IT?: THE MOTIVES, MORES, AND CHARACTER OF WHITE COLLAR CRIMINALS

PAMELA H. BUCY†  
ELIZABETH P. FORMBY††  
MARC S. RASPANTI†††  
KATHRYN E. ROONEY††††

### INTRODUCTION

Why do talented, bright, highly educated, successful people, who have “made it,” risk it all by lying, stealing, and cheating, especially when what they’re stealing is not much compared to what they have? The simple answer is, “because they can.” This Article looks at the more complex answer. Based upon extensive interviews with seasoned prosecutors and accomplished defense counsel, we explore the views and perceptions traditionally held about white collar criminals.<sup>1</sup> From January through April 2007, we conducted lengthy interviews with forty-five nationally recognized experts in the area of white collar crime.<sup>2</sup> The

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† Bainbridge Professor of Law, University of Alabama School of Law; Assistant United States Attorney, E.D. Missouri, 1980–1987.

†† J.D. Candidate, 2008, University of Alabama School of Law.

††† Partner, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Philadelphia, Pennsylvania. Mr. Raspanti is a former Philadelphia prosecutor and the chair of the firm’s White Collar Criminal Defense practice group. He also is involved in whistleblower, or qui tam litigation, under the federal and state statutes throughout the United States.

†††† J.D. Candidate, 2008, University of Alabama School of Law.

<sup>1</sup> See 45 C.F.R. § 46.102 (2007). Approval from the University of Alabama Institutional Review Board, No. 06-0R-213 (on file with the Univ. of Ala. Institutional Review Bd.).

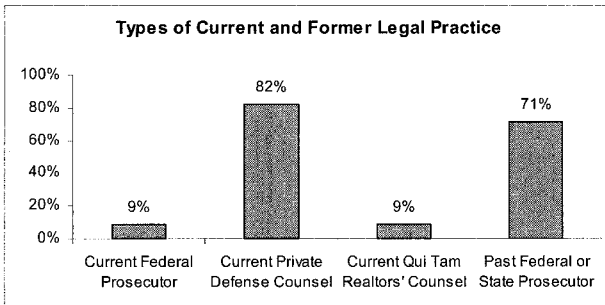
<sup>2</sup> The authors express their appreciation to the following individuals who participated in this survey: Daniel R. Anderson, Marcella B. Auerbach, Bernard S. Bailor, Raymond Banoun, James M. Becker, Robert S. Bennett, John T. Boese, Plato Cacheris, Leslie R. Caldwell, Peter W. Chatfield, Ian M. Comisky, Stephen S. Cowen, James E. Crowe III, Suzanne E. Durrell, Robert Fabrikant, Gerald A. Feffer,

interviewees included federal prosecutors, qui tam relators' counsel, and private defense counsel who specialize in defending those accused of white collar offenses.<sup>3</sup> The range of years of experience of study participants was vast. All interviewees had at least fifteen years of relevant experience;<sup>4</sup> over half had between twenty-six and thirty-five years of experience; and

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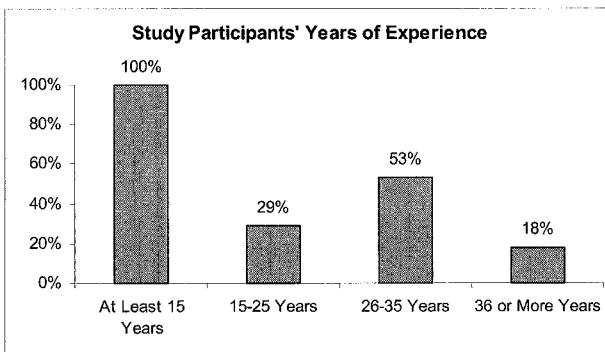
Karen F. Green, Frederick G. Helmsing, Brian J. Hennigan, Gabriel L. Imperato, Nancy S. Jones, Anthony A. Joseph, Paul L. Knight, Albert J. Krieger, David M. Laigaie, Frederick M. Levy, Michael K. Loucks, Abbe D. Lowell, Nancy Luque, Vincent L. Marella, Gregory P. Miller, William R. Mitchelson, Jane W. Moscowitz, James F. Neal, Kevin F. O'Malley, Martin S. Pinales, Larry S. Pozner, Michael W. Ramsey, Jack W. Selden, James G. Sheehan, Barry A. Short, Judson W. Starr, David J. Stetler, Robert L. Vogel, and Joe D. Whitley.

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*Infra app. A.*

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*Infra app. A.*

almost one-fifth had thirty-six or more years of experience.<sup>5</sup> Eighty-six percent of the defense counsel served as federal or state prosecutors prior to entering private practice.<sup>6</sup> The interview questions in our study are contained in Appendix A; the responses are in Appendix B.

We tested the following hypotheses: (1) most white collar criminals fall into two categories: “leader” or “follower;” (2) those falling into each category display distinct personality profiles; and (3) the methods for deterring crime differ for each category. We found that our hypotheses were generally accurate. Our study results provide guidance, not reflected in current scholarship, for how to effectively deter white collar crime.

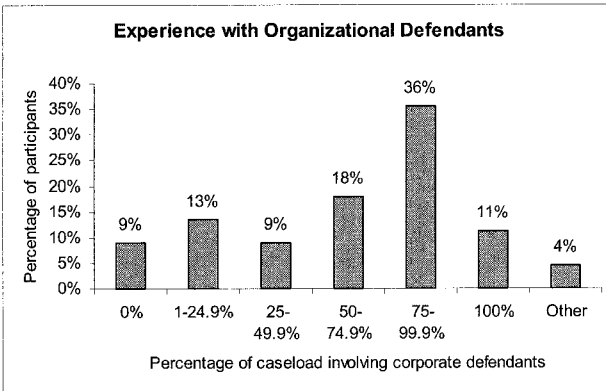
Part One of this Article begins with definitions. Part Two discusses our study results, comparing our findings to current scholarship. Part Three concludes with our observations and conclusions.

I. DEFINITIONS AND BACKGROUND

For purposes of this study, “white collar crime” refers to non-violent, business-related violations of state and/or federal criminal statutes.<sup>7</sup> At the beginning of the twentieth century,

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<sup>5</sup> *Infra* app. A. The participants also had a high caseload involving corporate defendants.



*Infra* app. A.

<sup>6</sup> *Infra* app. A.

<sup>7</sup> Almost without exception, study participants defined “white collar criminal” as someone who commits a non-violent, business-related crime. *See infra* app. B, § I, question I. Word choice differed from one to the next, but the same general idea runs through each response. Some also described such perpetrators as being in positions of power or “high social standing,” some cited specific crimes such as tax or stock

crime was evaluated from the classical perspective, in which criminal theorists maintained that humans all held the potential to engage in force or fraud out of self-interest, making no distinction between what scholars today segregate into white collar and more violent crime.<sup>8</sup> Criminal theory then evolved into the positivists' perspective, which took the classical theory even further by speculating that "crime is evidence of biological, psychological, or social pathology" and that force or fraud could only be explained by "special motive or compulsion."<sup>9</sup> Positivists believed that such compulsion could be traced to "low social class, poverty, or inequality,"<sup>10</sup> which left no room for the possibility that crime was committed by the wealthy in addition to the poor.

Perhaps in reaction to positivist theory, sociologist Edwin Sutherland changed the course of criminology when he coined the term "white collar crime" in a 1939 paper he presented to the American Sociological Society and later detailed in his book, *White Collar Crime*.<sup>11</sup> He defined white collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation."<sup>12</sup>

Statistical studies indicate that white collar crime occurs quite frequently. For example, according to the Association of Certified Fraud Examiners ("CFE"), fraud accounts for 6% of corporate losses in America annually, totaling an estimated \$660 billion each year.<sup>13</sup> Small businesses of less than 100 employees appear to be more frequent targets of white collar crime, with 46% of frauds being committed at these companies.<sup>14</sup> The largest corporations experience the smallest percentage of fraud

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fraud, and several included the distinction that white collar criminals have not committed street crimes or drug crimes. *See infra* app. B, § I, question I. Nearly all participants used the word "business," "financial," or "economic" when describing such crimes. *See infra* app. B, § I, question I.

<sup>8</sup> *See* MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 181 (1990).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 7 (Yale Univ. 1983) (1950).

<sup>12</sup> *Id.*

<sup>13</sup> ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE, at iii (2004), available at <http://www.cfenet.com/documents/2004RttN.pdf>. The CFE found that over 40% of the victimized corporations are privately-held, while just over 30% are public corporations (the balance is represented by government agencies and non-profit organizations). *Id.* at 5.

<sup>14</sup> *Id.* at 6.

schemes, though on average fraud in these companies costs more than schemes in much smaller companies.<sup>15</sup>

## II. STUDY RESULTS

### A. *White Collar Criminals: "Leaders" and "Followers"?*

The notion that white collar criminals can be described as either "leaders" or "followers" is strongly supported in the Federal Sentencing Guidelines, which, in large part, prescribe sentences based on two factors: the offense conduct and the defendant's criminal history.<sup>16</sup> The Guidelines provide stiffer sentences for those who actually commit a crime versus those who aid and abet, are accessories, or who participate as co-conspirators.<sup>17</sup> In this sense, the Guidelines recognize a distinction between those who lead the crime and those who assist in it.<sup>18</sup>

Most of the study participants (77.8%) agreed that white collar criminals fall into categories of either "leaders" or "followers."<sup>19</sup> One-fourth of these respondents provided caveats to their responses,<sup>20</sup> for example, by identifying a third category as those who "retaliate" either by becoming whistleblowers or by agreeing to testify for the government in exchange for complete immunity, a reduced charge, or a reduced sentence.<sup>21</sup> Another example would be those who wander unknowingly into white collar crime schemes, never realizing they are violating the law.<sup>22</sup>

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<sup>15</sup> *Id.* Corporations with more than 10,000 employees lose on average \$105,500 per scheme, corporations with 1,000 to 9,999 employees lose \$87,500 per scheme, corporations with 100 to 999 employees lose \$78,500 per scheme, and those with fewer than 100 employees lose \$98,000 per scheme. *Id.* Put further into perspective, employee theft affects 95% of all American organizations. See Christine A. Henle, *Predicting Workplace Deviance from the Interaction Between Organizational Justice and Personality*, 17 J. MANAGERIAL ISSUES 247, 247 (2005); see also MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME 23 (1983); GOTTFREDSON & HIRSCHI, *supra* note 8, at 181; SUTHERLAND, *supra* note 11, at 7.

<sup>16</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2005), available at <http://www.ussc.gov/2005guid/gl2005.pdf>.

<sup>17</sup> *Id.* § 3B1.2.

<sup>18</sup> *Id.*

<sup>19</sup> *Infra* app. B, § II, question II(a). Meanwhile, five (11.1%) fully disagreed and five (11.1%) saw different gradations of categories or thought there was only one type of white collar criminal—the principal. *Infra* app. B, § II, question II(a).

<sup>20</sup> *Infra* app. B, § II, question II(a).

<sup>21</sup> See *infra* app. B, § II, question II(a).

<sup>22</sup> See *infra* app. B, § II, question II(a). One participant, intending to further

Some participants pointed out that the line between "leaders" and "followers" becomes blurred depending on the nature of the investigation and the charges brought against the criminal,<sup>23</sup> and that followers may morph or graduate at some point into principals.<sup>24</sup>

Study participants who disagreed that white collar criminals fall into the two categories of leaders and followers suggested that it is difficult to fit such criminals into specific categories.<sup>25</sup> These respondents thought that the two categories were an "over-simplified view of the world," and that there was "more of a spectrum" and "not a sharp distinction between the two."<sup>26</sup> They tended to view white collar criminals as individuals who find themselves involved in schemes that are initially small in scale, but over which they quickly lose control.<sup>27</sup> One participant suggested that there are not usually "followers," but there are those who help in the scheme and eventually become principals in it.<sup>28</sup> This view is consistent with that of those participants who thought that some white collar defendants get involved in criminal activity before realizing that something is wrong and then stay with the scheme, either because they don't know how to get out or because they decide they can personally benefit from it.<sup>29</sup>

## B. *Motives for Committing White Collar Crimes*

### 1. Motives of "Leaders"

Greed was the most commonly cited reason by study participants as to why "leaders" engage in white collar criminal acts.<sup>30</sup> Money, financial gain, and greed were cited by almost every participant in the study as the motive for committing crime

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distinguish the various types of leaders and followers that exist among white collar criminals, identified four categories of offenders: (1) instigators/designers; (2) outside professionals, such as lawyers and accountants; (3) internal actors with some standing in the organization; and (4) low-level employees. *Infra* app. B, § II, question II(a).

<sup>23</sup> See *infra* app. B, § II, question II(a).

<sup>24</sup> See *infra* app. B, § II, question II(a).

<sup>25</sup> See *infra* app. B, § II, question II(a).

<sup>26</sup> *Infra* app. B, § II, question II(a).

<sup>27</sup> See *infra* app. B, § II, question II(a).

<sup>28</sup> See *infra* app. B, § II, question II(a).

<sup>29</sup> See *infra* app. B, § II, question II(a).

<sup>30</sup> See *infra* app. B, § II, question II(b).

with some listing this as the sole motivator and others including it among top reasons.<sup>31</sup> Beyond greed, participants noted opportunity, a sense of entitlement, arrogance, competitiveness, and rationalization as motivating factors.<sup>32</sup> Some participants thought that “leaders” are often motivated by fear of failure or of losing one’s job or lifestyle.<sup>33</sup> With such fear, desperation kicks in and overrides the individual’s inner moral compass.<sup>34</sup> Other participants thought that white collar criminals cut ethical corners because of pressure from above to meet particular financial goals.<sup>35</sup> In so doing, these actors either convince themselves that the act is not really criminal or they believe their actions are a common practice in their field, and, therefore, they will not or should not get in trouble.<sup>36</sup> Interestingly, less than 5% of the study participants expressed the view that white collar criminals commit crimes because they are “amoral” or “evil.”<sup>37</sup>

Convicted white collar defendants confirm these views. For example, Walt Pavlo, Credit Collections Manager at MCI Telecommunications, Inc., who falsified MCI accounts receivables and stole \$6 million from MCI,<sup>38</sup> spoke of greed, opportunity, and culture. Pavlo’s journey into crime ended in the federal penitentiary. In 1995, Pavlo was a credit and collections manager at MCI whose job was to collect on debts owed to MCI by large corporate clients. Pavlo’s job was not easy. MCI had liberally extended large lines of credit to high-risk customers and refused to write-off receivables as bad debt. Most of Pavlo’s collection efforts were fruitless. Desperate to keep his job, he began to employ suspect accounting techniques to hide the unpaid debt. Pavlo also found a way to siphon off \$6 million for

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<sup>31</sup> See *infra* app. B, § II, question II(b).

<sup>32</sup> See *infra* app. B, § II, question II(b).

<sup>33</sup> See *infra* app. B, § II, question II(b).

<sup>34</sup> See *infra* app. B, § II, question II(b).

<sup>35</sup> See *infra* app. B, § II, question II(b).

<sup>36</sup> See *infra* app. B, § II, question II(b).

<sup>37</sup> *Infra* app. B, § II, question II(b).

<sup>38</sup> Interview with Walt Pavlo, Credit Collections Manager, MCI Telecomms. (Mar. 7, 2007). For more information, see MARTIN T. BIEGELMAN & JOEL T. BARTOW, EXECUTIVE ROADMAP TO FRAUD: PREVENTION AND INTERNAL CONTROL 186–97 (2006); Greg Farrell & Jayne O’Donnell, *Ethics Training as Taught by Ex-Cons: Crime Doesn’t Pay*, USA TODAY, Nov. 16, 2005, at 1B; Neil Weinberg, *Ring of Thieves*, FORBES, June 10, 2002, at 64; *Nightline: Walt Pavlo: The Visiting Fellow of Fraud* (ABC television broadcast Jan. 30, 2006).



himself. When Pavlo's house of cards finally came crashing down, he turned himself into the FBI and struck a deal.

Pavlo, who holds a Bachelors of Science degree in industrial engineering and a Masters degree in business administration, was a success story before his theft and fraud at MCI. Blond, boyishly handsome, a high school athlete, married with two children, and living in a palatial suburban home, Pavlo had it all—until he went to a federal prison for forty-one months on charges of mail fraud, money laundering, and obstruction of justice. When he was released from prison, Pavlo and his wife divorced, he found himself unemployable, and at age forty-one, was living at home with his parents and looking for work.

We asked Pavlo why he did it. Cash was certainly a reason, Pavlo admits. Making more money "felt good," and he thought he could "get away with it."<sup>39</sup> But, he also felt a lot of pressure from within MCI and did not know how to meet MCI's mandates without cheating. His performance reviews were based entirely on how much of MCI's bad debt he collected. At the time he began falsifying MCI's accounts, Pavlo thought MCI was rampant with fraud. Since everyone around him appeared to be acting unethically, he thought his fraudulent accounting of bad debt and theft of MCI's money would never be discovered. Pavlo admits that at first he was afraid but "[a]fter a while I went through a stage of being afraid . . . then I became bitter about how life was going for me, so I was immune to how wrong it was to do what I was doing."<sup>40</sup> Toward the end, Pavlo wanted an exit strategy from his scheme, but he had become hooked to the extra money. Also, he couldn't figure out how to get out without getting caught.

Pavlo talks about how easy it was to cross the line:

I am a cautious person, but once someone opens the door I will charge through it. I have been known to be pretty aggressive. I don't have a lot of fear in taking business risks, though I have more now. I see things pretty quickly, act quickly and don't think things all the way through.<sup>41</sup>

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<sup>39</sup> Interview with Walt Pavlo, *supra* note 38.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

## 2. Motives of "Followers"

Compared to the nearly unanimous view of our study participants that "leaders" engage in white collar crimes because of greed, there was less consensus among study participants about the motives of "followers."<sup>42</sup> Four different themes emerged from our interviews.<sup>43</sup> One view was that "followers" are non-assertive, "weak" people who trail behind someone else, even into criminal schemes.<sup>44</sup> The second view was that followers are "convinced of the rightness of their cause."<sup>45</sup> If they have any doubts, they believe that no harm can come to them because they are following a leader whom they trust—or fear.<sup>46</sup> Followers tend to be naïve and unaware of what is really happening, or they are simply taken in by the personal charisma of the leader and are intensely loyal to that person.<sup>47</sup> The third view was that followers engage in criminal acts to make more money and because they desire a "piece of the action."<sup>48</sup> They want to increase their status or receive a promotion, and they believe that if they curry favor with the "leader," they will achieve their ambitions.<sup>49</sup> These followers believe that criminal acts are the only way to compete.<sup>50</sup> The fourth view was that the followers are motivated by fear of losing their job or of physical harm.<sup>51</sup>

## C. Personality Traits of White Collar Criminals

### 1. Personalities of "Leaders"

The study participants who thought that white collar criminals fall into two groups consistently described "leaders" as "Type A" personalities: intelligent, arrogant, cunning, successful, greedy, prone to take risks, aggressive, narcissistic, determined, and charismatic.<sup>52</sup> Only fifteen percent of study participants

<sup>42</sup> See *infra* app. B, § II, question II(d).

<sup>43</sup> See *infra* app. B, § II, question II(d).

<sup>44</sup> See *infra* app. B, § II, question II(d).

<sup>45</sup> See *infra* app. B, § II, question II(d).

<sup>46</sup> See *infra* app. B, § II, question II(d).

<sup>47</sup> See *infra* app. B, § II, question II(d).

<sup>48</sup> See *infra* app. B, § II, question II(d).

<sup>49</sup> See *infra* app. B, § II, question II(d).

<sup>50</sup> See *infra* app. B, § II, question II(d).

<sup>51</sup> See *infra* app. B, § II, question II(d).

<sup>52</sup> See *infra* app. B, § II, question II(c). One participant said that

ventured to describe common demographic traits and without exception these participants stated that white collar criminals are most often men, not women,<sup>53</sup> and that "leaders" tend to be white, upper-middle class, and well-educated people.<sup>54</sup>

Descriptions of recent high-profile white collar defendants bear out these descriptions. In 2001, news broke regarding massive fraud at Enron committed by CEOs Ken Lay and Jeff Skilling, along with CFO Andrew Fastow, which had resulted in an overstatement of the company's value by \$1.2 billion.<sup>55</sup> The entire company eventually went out of business.<sup>56</sup> Trial observers described Ken Lay, CEO of Enron,<sup>57</sup> during his fraud trial as "arrogant and controlling from start to finish . . . deeply resentful of the government's Enron investigation."<sup>58</sup> Lay was unapologetic and indignant throughout the trial, even after his conviction. Indeed, he died without ever showing remorse for his actions.<sup>59</sup> In 2002, the SEC began investigating spending indiscretions by Tyco CEO Dennis Kozlowski.<sup>60</sup> Kozlowski was described as a "supreme narcissist who was also highly skilled in accumulating power by winning people to his point of view" whose actions were motivated by a "sense of entitlement."<sup>61</sup> In 2002, WorldCom filed for bankruptcy as a result of accounting

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principals/architects tend to think that the government is after them and that they are the true victims. *Infra* app. B, § II, question II(c).

<sup>53</sup> See *infra* app. B, § II, question II(c).

<sup>54</sup> See *infra* app. B, § II, question II(c). It is worth noting that several participants said that there was absolutely no common denominator with respect to demographics among such criminals, and the vast majority (74.3%) said they had not noticed any common demographics. See *infra* app. B, § II, question II(c).

<sup>55</sup> Stephen Taub, *Subtract Half a Billion: Enron Admits It Overstated Earnings*, CFO.COM, Nov. 9, 2001, <http://careers.cfo.com/article.cfm/3001976>.

<sup>56</sup> *The Rise and Fall of Enron*, BBC NEWS, July 5, 2006, <http://news.bbc.co.uk/2/hi/business/5018176.stm>.

<sup>57</sup> Lay was convicted on ten counts of securities fraud. *Enron Execs Found Guilty on Multiple Conspiracy, Fraud Charges*, DEMOCRACY NOW!, May 26, 2006, <http://www.democracynow.org/article.pl?sid=06/05/26/1410242>.

<sup>58</sup> Alexei Barrionuevo, *Lay Seems to Have Thought Courtroom Was Boardroom*, INT'L HERALD TRIB. (Atlantic), May 4, 2006, at 13.

<sup>59</sup> While the case was on appeal, he died of a heart attack and never served his prison sentence. See Shankar Vedantam, *Forgive and Forget: Maybe Easier Said than Done*, WASH. POST, July 10, 2006, at A02.

<sup>60</sup> See Press Release, Tyco, Investor Relations (Apr. 17, 2006), available at <http://investors.tyco.com/phoenix.zhtml?c=112348&p=irol-newsArticle&ID=843274&highlight=>. Unlike Enron, Tyco did not collapse—but nine members of its Board of Directors were dismissed. *Id.*

<sup>61</sup> Patricia O'Connell, *The CEO as Thief: A Psychological Profile*, BUS. WK., Dec. 23, 2002, [http://www.businessweek.com/magazine/content/02\\_51/b3813012.htm](http://www.businessweek.com/magazine/content/02_51/b3813012.htm).

fraud led by its CEO Bernie Ebbers.<sup>62</sup> Ebbers has been described as “arrogant and pompous . . . brusque and short-tempered . . . dismissive of everyone.”<sup>63</sup>

## 2. Personalities of “Followers”

This question received the fewest number of responses from our study participants with almost half (44.5%) of the participants either opting out of this question or reporting that they had not observed a typical personality type among followers.<sup>64</sup> Those who did respond, however, were consistent, describing “followers” as less confident, less aggressive, less ambitious,<sup>65</sup> passive, subservient, dominated,<sup>66</sup> gullible, prone to blindly follow others, and less likely to accept responsibility for their own actions. In the view of these study participants, followers tend to view their actions as less culpable since they are only doing what the “leader” asks.<sup>67</sup>

## 3. Scholarship on Personality Traits of White Collar Defendants

There remains a principled debate among scholars as to what role personality plays in criminality. According to Edwin Sutherland, who first described white collar crime as a phenomenon different from street crime, a flaw of character is not the main cause of white collar criminal activity. Rather, in his view, it is the “situations and social bonds within an organization,” that create an environment which encourages white collar crime.<sup>68</sup>

Rational choice theorists largely concur with Sutherland’s view, finding that white collar defendants, like other criminal participants, “pursue desired goals, weigh likely consequences, and select among options.”<sup>69</sup> When “[c]riminal opportunity is

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<sup>62</sup> *Ebbers Indicted, Ex-CFO Pleads Guilty*, CNN MONEY.COM, Mar. 2, 2004, <http://money.cnn.com/2004/03/02/technology/ebbers/index.htm>.

<sup>63</sup> *Profile: Bernie Ebbers*, BBC NEWS, July 13, 2005, <http://news.bbc.co.uk/2/hi/business/4352553.stm>.

<sup>64</sup> *Infra* app. B, § II, question II(e).

<sup>65</sup> *See infra* app. B, § II, question II(e).

<sup>66</sup> *See infra* app. B, § II, question II(e).

<sup>67</sup> *See infra* app. B, § II, question II(e).

<sup>68</sup> Tage Alalehto, *Economic Crime: Does Personality Matter?*, 47 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 335, 335 (2003) (describing Sutherland’s views).

<sup>69</sup> NEAL SHOVER & ANDY HOCHSTETLER, CHOOSING WHITE-COLLAR CRIME 109

attractive as a means of responding to desire to assist family crises or forestalling a fall,"<sup>70</sup> rational actors will choose it.<sup>71</sup> Like Sutherland, rational choice theorists maintain that corporate culture encourages white collar crime when breaking the law is a rational choice under the circumstances.

Similar to rational choice theory is the view that white collar crime can often be attributed to managerial decisions that push employees to commit crimes out of fear and the pressure placed on them to perform.<sup>72</sup> Noted scholar Marshall B. Clinard concluded that "[u]ndue corporate pressures upon middle management may lead to their becoming engaged in illegal or unethical behavior."<sup>73</sup> Like Sutherland and the rational choice theorists, Clinard concludes that the structure of an organization itself and the ethics it employs determines whether the employees will engage in white collar crimes.<sup>74</sup>

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(2006).

<sup>70</sup> *Id.* at 113.

<sup>71</sup> Criminals under this theory are "purposeful, calculating, and instrumental agent[s] who constantly consider[] the pros and cons, risks and sanctions in every single crime opportunity." See Alalehto, *supra* note 68, at 336.

<sup>72</sup> Nicole Leeper Piquero & Sally S. Simpson, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 L. & SOC'Y REV. 509, 510 (2002).

<sup>73</sup> CLINARD, *supra* note 15, at 22. He conducted a study in which 25% of respondents, all middle managers, said that they themselves endured enough pressure from their employer that it could lead to illegal activities, and 90% said that they believed such pressures generally lead to unethical decisions. *Id.* at 95. His research further highlighted the extent to which senior management conduct affects the behavior of others in the corporation when more than half of the middle managers he interviewed reiterated that senior managers "dominate" the ethics of the business. *Id.* at 133.

<sup>74</sup> See, e.g., Zabihollah Rezaee, *The Three Cs of Fraudulent Financial Reporting*, INTERNAL AUDITOR, Oct. 2002, available at [http://findarticles.com/p/articles/mi\\_m4153/is\\_5\\_59/ai\\_93081905](http://findarticles.com/p/articles/mi_m4153/is_5_59/ai_93081905). Researcher Zabihollah Rezaee developed a similar theory specific to financial reporting frauds in which he proposed that the wrong combination of conditions, corporate structure, and choice (collectively referred to as the Three Cs) can create an environment that encourages white collar crime. *Id.* He described conditions as being "the motivations and pressure to engage in financial statement fraud," which frequently surface from outside investor and analyst pressure to meet certain financial targets. *Id.* A faulty corporate structure would be one in which corporate governance is not taken seriously and what governance exists is plagued by inadequacies. *Id.* Such structures may be characterized by "aggressiveness, arrogance, cohesiveness, loyalty, blind trust, control ineffectiveness, and gamesmanship." *Id.* Choice comes into play with managers who must make determinations of whether to employ ethical strategies to improve financial measurements and corporate growth. *Id.* When considered collectively, the Three Cs create a metric for understanding why financial reporting fraud may be, in fact, encouraged by the corporation itself through the ethics it endorses, the corporate governance structure it maintains, and the inability it has to withstand outside

The modern approach to studying white collar crime focuses more on the criminal's personality traits as a factor in the decision to commit the crime,<sup>75</sup> although there is disagreement as to how important personality may be,<sup>76</sup> and which specific personality traits are common among white collar criminals. In general, however, scholars have described eight personality characteristics that fuel white collar criminal activity: (1) need for control; (2) bullying; (3) charisma; (4) "fear of falling;" (5) company ambition; (6) lack of integrity; (7) narcissism; and (8) a lack of social conscience. Significantly, this scholarship, unlike our study participants, does not view white collar criminals as either leaders or followers. As discussed in Part III of this Article, this omission is a missed opportunity for developing effective deterrence strategies for white collar crime.

*a. Need for Control*

Sally S. Simpson and Nicole L. Piquero<sup>77</sup> suggest that the need-to-control is a characteristic among white collar criminals.<sup>78</sup> People with a high desire-for-control are "assertive, decisive, and active."<sup>79</sup> They usually seek leadership roles in group situations,

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pressures to commit fraud in the name of financial success.

<sup>75</sup> Criminologists have speculated that Sutherland, and others who believe personality should not be considered, failed to understand that simply because white collar criminals do not generally have psychological defects does not mean that their personalities do not affect the crimes they commit. See Alalehto, *supra* note 68, at 336. Mental illness may not be endemic to white collar criminals, but they still may have personality traits that make them more likely to see crime as the best alternative to other consequences they may face in the workplace.

<sup>76</sup> See, e.g., GOTTFREDSON & HIRSCHI, *supra* note 8, at 87 ("What [Sutherland's] classical theory lacks is an explicit idea of self-control, the idea that people also differ in the extent to which they are vulnerable to the temptations of the moment."). These theorists further maintain:

Sociological criminology takes the position that no trait of personality has been shown to characterize criminals more than noncriminals. Psychological criminology takes the position that many personality traits have been shown to characterize criminals more than noncriminals. We take the position that both views are wrong. The level of self-control, or criminality, distinguishes offenders from nonoffenders, and the degree of its presence or absence can be established before (and after) criminal acts have been committed. This enduring tendency is well within the meaning of "personality trait" and is thus contrary to the sociological view.

*Id.* at 108–09 (citations omitted).

<sup>77</sup> See Simpson & Piquero, *supra* note 72, at 509.

<sup>78</sup> See *id.* at 517–18.

<sup>79</sup> Nicole Leeper Piquero et al., *Integrating the Desire-for-Control and Rational Choice in a Corporate Crime Context*, 22 JUST. Q. 252, 257 (2005) (quoting Jerry M.

accomplish more in the face of adversity, put forth more effort, and are able to visualize the end-goal.<sup>80</sup> They tend to not take personal responsibility for failure and blame failure on uncontrollable external factors.<sup>81</sup> They also tend to have a perception of control when in fact they do not, and they tend to believe that goals can be attained that are impossible or unusually difficult.<sup>82</sup> A natural consequence of this view is taking higher risks than otherwise necessary.<sup>83</sup>

*b. Bullying*

Other researchers have highlighted executives' tendencies to bully subordinates into compliance with their demands so as to enhance personal gain.<sup>84</sup> For example, Qwest CEO Joe Nacchio apparently climbed the corporate ladder by seeking complete compliance among Qwest employees.<sup>85</sup> In describing Nacchio, one senior executive said, "[p]eople (were) just afraid of the man."<sup>86</sup> He created such "a culture of fear" that Qwest employees thought it was better to comply with his demands rather than question them, or fail to meet his demands and face his wrath.<sup>87</sup>

*c. Charisma*

One group of modern researchers contends that personal gain motivates only a small majority of executives to commit white collar crimes.<sup>88</sup> Instead, these researchers suggest that charisma determines a person's propensity to engage in white collar crime.<sup>89</sup> Charismatic leaders motivate others to implement their vision, are extraordinarily self-assured, have strong

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Burger & Harris M. Cooper, *The Desirability of Control*, 3 MOTIVATION & EMOTION 381, 383 (1979)).

<sup>80</sup> See *id.* at 257–58.

<sup>81</sup> See *id.* at 258.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See Greg Griffin, *Criminal Charges Possible*, DENVER POST, Mar. 16, 2005, at A01.

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Katherine A. DeCelles & Michael D. Pfarrer, *Heroes or Villains? Corruption and the Charismatic Leader*, 11 J. LEADERSHIP & ORGANIZATIONAL STUD. 67, 68 (2004).

<sup>89</sup> See *id.* at 70–71.

convictions, and are enthusiastic.<sup>90</sup> When such leaders come into their position with gusto, others in the organization clamor to follow their direction.<sup>91</sup> Charismatic leaders tend to push the envelope since no internal resistance arises to such efforts. Especially when the charismatic leader arrives at a time of corporate weakness with a mandate to get the company back on course, followers are so desperate for a new direction that they follow the leader, failing to raise concerns at questionable decisions the leader makes.<sup>92</sup>

d. *"Fear of Falling"*

Scholars suggest that some white collar defendants commit crimes because "they . . . [are] fearful of loss of professional or financial status" and are motivated to make unethical decisions to preserve their material wealth, professional reputation, and institutional power.<sup>93</sup> Such people "would be reasonably happy with the place they have achieved through conventional means if only they could keep that place."<sup>94</sup> As the economy changes or a firm falters, people who have reached the heights of wealth, power, and success grab what they can get before their achievements are washed away by the changing tide.<sup>95</sup> They "perceive this situation as a short-term threat that can be met through short-term fraud,"<sup>96</sup> and view themselves as making a small decision that will maintain the status quo until the economy or the firm's course resumes its upward climb.<sup>97</sup> In short, fear of losing what they have gained, when such loss appears possible, motivates these business people to do what it takes to keep themselves from falling.<sup>98</sup>

e. *The Need for Corporate Success*

Other scholars suggest that perhaps it is not personal greed but corporate greed—the desire to "further the interests of the

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<sup>90</sup> *See id.* at 69.

<sup>91</sup> *See id.* at 74–75.

<sup>92</sup> *See id.* at 73–74.

<sup>93</sup> Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 254 (1999).

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*



firm itself,"<sup>99</sup> that drives some white collar defendants to commit crimes. This "corporate greed" may come from shareholder pressure to achieve new heights in corporate profitability or growth.<sup>100</sup> Notably, personal greed may often be linked to the interests of a firm, since decisions that propel a company often bring more personal rewards to high-level executives.

*f. Narcissism*

Australian psychologist Grace Duffield describes general attributes of entrepreneurs turned white collar criminals as "extremely ambitious . . . obsessed with enhancing power and control," having "a sense of superiority bordering on narcissism" which is fed by "admiration and attention" and which encourages a "sense of entitlement" to "special privileges and extra resources."<sup>101</sup>

These individuals "lack the ability to put themselves in the place of others,"<sup>102</sup> or envision that the consequences of their actions may fall on the shoulders of numerous other people.<sup>103</sup> These are people with a great desire for gratification, risk, and personal success, whose need for power and control take on similar attributes to that of a drug addiction.<sup>104</sup> Feed them a little and they will become hooked, constantly wanting to test the waters even deeper and push to the outer limits of ethical behavior.<sup>105</sup>

*g. Lack of Integrity*

Believing that not all behavior is innate but that some is learned, Mortimer Dittenhofer speculates that one identifying personality trait of white collar criminals is "the individual's personal code of conduct—ethics, honesty, morality and other

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<sup>99</sup> Helen A. Garten, *Insider Trading in the Corporate Interest*, 1987 WIS. L. REV. 573, 576 (1987).

<sup>100</sup> See DeCelles & Pfarrer, *supra* note 88, at 71–72.

<sup>101</sup> David Litterick, *Rich—But by No Means Beyond the Dreams of Avarice*, DAILY TELEGRAPH (London), Nov. 19, 2005, at 33.

<sup>102</sup> Karin H. Cather, *It's Not an Airborne Virus: Dr. Stanton Samenow Challenges the Disease Model of Drug Addiction*, PROSECUTOR, July/Aug. 2004, at 12.

<sup>103</sup> See *id.* at 12–13.

<sup>104</sup> See *id.* at 11–12.

<sup>105</sup> See *id.* at 11–13 (stating that all criminals and drug addicts have personalities that favor involvement in a thrilling but unsafe and unethical world in which responsible people refuse to participate).

such generators of integrity.”<sup>106</sup> His theory holds that people who lack integrity justify crimes with ease whereas someone with substantial integrity struggles to commit those crimes.<sup>107</sup> These white collar criminals do not seem to fear being caught or what punishments may come their way. They dismiss whatever brief moments of ethical clarity they experience as they rationalize committing the crime.<sup>108</sup> This postulation is made more ominous by the observation of Professor Donald Langevoort that “[i]t is quite likely . . . that people with a particular facility for rationalization dominate organizational hierarchies.”<sup>109</sup>

A focus on integrity may be why the personal lives of business executives have come under more scrutiny in recent years. As one seasoned prosecutor noted, there is “a common thread running through some recent scandal-prone companies: Many top executives accused of betraying the trust of shareholders also betrayed the trust of their wives.”<sup>110</sup> He explained that philanderers and white collar criminals share traits: “If their life is a lie, it’s not confined to their personal life.”<sup>111</sup>

#### *h. Lack of Social Conscience: “Fish Rot from the Head”<sup>112</sup>*

Similar to the view that those who succumb and commit white collar crimes have an undeveloped sense of personal integrity is the notion that some individuals lack “social conscientiousness.”<sup>113</sup> Professors Judith M. Collins and Frank L. Schmidt examined convicted white collar criminals and described five major components of these individuals’ personalities that fueled their propensity to commit such crimes: performance; socialization; tolerance; responsibility; and extra-curricular activity.<sup>114</sup> Collins and Schmidt focused on the fifth component,

<sup>106</sup> Mortimer A. Dittenhofer, *The Behavioural Aspects of Fraud and Embezzlement*, PUB. MONEY & MGMT., Jan.–Mar. 1995, at 10.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 874 (1995).

<sup>110</sup> Jayne O’Donnell & Greg Farrell, *Business Scandals Prompt Look into Personal Lives*, USA TODAY, Nov. 5, 2004, at B1.

<sup>111</sup> *Id.* (quoting Thomas DiBiagio, U.S. Attorney, District of Maryland).

<sup>112</sup> *Id.* (quoting Robert Hogan, a management consultant and psychologist).

<sup>113</sup> Judith M. Collins & Frank L. Schmidt, *Personality, Integrity, and White Collar Crime: A Construct Validity Study*, 46 PERSONNEL PSYCHOL. 295, 295 (1993).

<sup>114</sup> *Id.* at 302–07.

extra-curricular activity, as a common strand connecting the first four components.<sup>115</sup> Performance, socialization, tolerance and responsibility each contain this concept of “social conscientiousness,” which is the ability to make decisions that are “prosocial.”<sup>116</sup>

#### D. *Guilty Corporations?*

Our study participants have a wide range of experience with organizational defendants from caseloads dominated by corporate criminal liability to caseloads where it was almost non-existent. Almost every study participant (91.1%), however, has been involved with defendant or target corporations to some extent.<sup>117</sup> Almost half of the participants (46.7%) have caseloads dominated by corporate defendants or targets.<sup>118</sup> Just over 10% of the participants deal with criminal corporate liability issues in every case.<sup>119</sup>

##### 1. Factors Prosecutors Consider in Deciding Whether to Prosecute Corporations

Of our 45 study participants, 80% have had prosecutorial experience at some point in their careers or are currently serving as federal prosecutors.<sup>120</sup> Their experiences demonstrate the dramatic trend toward prosecuting organizations in recent years. Of the former prosecutors, roughly one-third (37.5%) indicated that they rarely, if ever, charged a corporation criminally during their tenure as a prosecutor.<sup>121</sup> Yet, none of the current prosecutors indicated a similar hesitancy toward prosecuting the corporate entity.<sup>122</sup>

Interestingly, the factors considered by prosecutors in deciding whether to pursue fictional entities have not changed much over the years despite intense attention in recent years by the United States Department of Justice to developing and refining these factors.<sup>123</sup> The key factor mentioned by all of the

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<sup>115</sup> *Id.* at 308.

<sup>116</sup> *Id.* at 307–08.

<sup>117</sup> *Infra* app. B, § III, question III(a).

<sup>118</sup> *Infra* app. B, § III, question III(a).

<sup>119</sup> *Infra* app. B, § III, question III(a).

<sup>120</sup> *Supra* notes 3–4 and accompanying text.

<sup>121</sup> *Infra* app. B, § III, question III(b)(1)(a).

<sup>122</sup> *See infra* app. B, § III, question III(b)(1)(a).

<sup>123</sup> *See* Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S.

current prosecutors and 40.6% of the former prosecutors was the pervasiveness of the illegal conduct within the corporate structure, including whether upper-level management was involved and whether there was corporate acceptance of the conduct.<sup>124</sup> Other factors considered by current and former prosecutors alike were: the level of cooperation with law enforcement by the corporation after the fraud was detected, the existing corporate compliance plan, and the harm done by the conduct.<sup>125</sup> When looking at the harm, current and former prosecutors examined the type of harm (financial or physical), the extent of the harm, and the impact on innocent shareholders and employees.<sup>126</sup> Other considerations included the level of intent present within the corporation, the deterrence factor, and the likelihood of a conviction.<sup>127</sup>

Many of the defense counsel in our study tended to be somewhat jaded about current prosecutorial decision making. They viewed current prosecutorial decisions as motivated more by public perception or outside influences than the corporation's actions. Despite the continued focus on corporate cooperation and recent U.S. Department of Justice guidelines for prosecutors in charging corporations, only 10.2% of defense counsel thought

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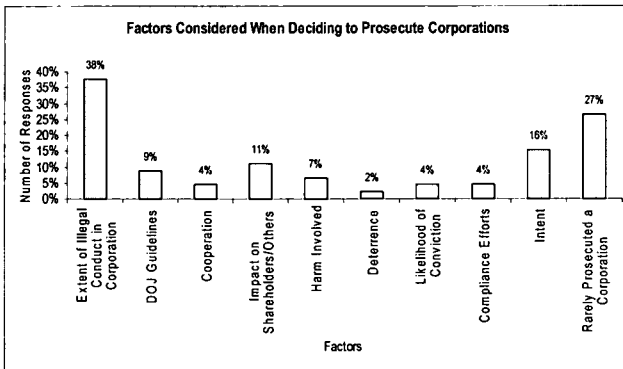
Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm); see also Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

<sup>124</sup> *Infra* app. B, § III, question III(b)(1)(a).

<sup>125</sup> See *infra* app. B, § III, question III(b)(1)(a).

<sup>126</sup> See *infra* app. B, § III, question III(b)(1)(a).

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*Infra* app. A.

current prosecutors consider these guidelines when prosecuting cases.<sup>128</sup> Rather, over one-fourth of defense counsel (28%) suggested that when choosing which cases to pursue, prosecutors were looking for "impact," were trying to send a message, or seeking publicity.<sup>129</sup>

## 2. How to Keep Corporations from Being Indicted

Study participants currently in private practice discussed with us strategies a corporation facing potential prosecution should adopt to minimize exposure.<sup>130</sup> Their advice fell into three categories: (1) the importance of cooperating with the government; (2) distinguishing individuals from the corporate entity; and (3) pursuing and demonstrating internal efforts to address the wrongdoing.<sup>131</sup>

Almost half of the defense counsel (43.6%) stated that full cooperation by the corporation with the government was necessary to avoid prosecution or reduce its impact.<sup>132</sup> As one participant noted, "[t]oday the strategy is complete and total cooperation."<sup>133</sup> Within this general strategy, however, there were nuances, with some defense counsel (10.3%) advocating a sliding scale of cooperation, depending on the circumstances.<sup>134</sup> Almost half of defense counsel interviewed (46.2%) stated that a

<sup>128</sup> *Infra* app. B, § III, question III(c)(1)(b).

<sup>129</sup> *Infra* app. B, § III, question III(c)(1)(b). While a majority of the current and former prosecutors interviewed (72%) indicated that there was an impact on a prosecutor's legal career based on the type of cases that were selected to be prosecuted, they articulated the impact as creating expertise, not intentional career advancement. *Infra* app. B, § III, question III(b)(1)(b). While recognizing that prosecutors develop expertise through the cases they handle and to that extent their career is impacted, over one-fourth of the current and former prosecutors (27.8%) observed no career impact based on cases chosen for prosecution. *Infra* app. B, § III, question III(b)(1)(b).

Defense counsel variously mentioned the following as factors for prosecutors' choice: deterrence; political or policy concerns; the priorities of the executive and legislative branches as driving forces; Department of Justice guidelines; the likelihood of prevailing at trial; the merits of the case; the harm involved when making decisions regarding case selections, including the financial harm from the offense; the impact of prosecution on the victims; the ability to recover financially to mitigate the harm caused; and the egregiousness, clarity, and pervasiveness of the crime. *See infra* app. B, § III, question III(c)(1)(b).

<sup>130</sup> *See infra* app. B, § III, question III(c)(1)(a).

<sup>131</sup> *See infra* app. B, § III, question III(c)(1)(a).

<sup>132</sup> *Infra* app. B, § III, question III(c)(1)(a).

<sup>133</sup> *Infra* app. B, § III, question III(c)(1)(a).

<sup>134</sup> *Infra* app. B, § III, question III(c)(1)(a).

company should also pursue an “internal strategy,” either instead of, or in concert with, the company’s cooperation with the government.<sup>135</sup> Such an “internal strategy” includes compliance programs, internal investigations, and internal punishment of wrongdoers.<sup>136</sup>

Over half of defense counsel (51.3%) spoke of the importance of separating the corporation from potentially culpable employees.<sup>137</sup> Doing so allows the company “to show [that the wrongdoings were] isolated incidents and that there was no knowledge or approval from upper management.”<sup>138</sup>

### 3. Characteristics of Organizations That Encourage Criminal Activity

While many of the study participants were quick to point out that most, if not all, legitimate companies do not actively encourage criminal activity, they did identify four corporate practices and policies that encourage fraud.<sup>139</sup>

The first such policy was a corporation being driven by the bottom line.<sup>140</sup> Fully one-third of the participants (33.3%) thought that an overriding focus on profit and “meet[ing] the numbers” encouraged criminal activity.<sup>141</sup> As one participant noted, corporations that “focus on the profits at the cost of activities that . . . ferret[] out wrongdoing and punish[] it” are ripe for fraud.<sup>142</sup>

The second characteristic participants noted of companies where fraud occurs was lack of an effective corporate compliance plan.<sup>143</sup> Over one-fourth of the participants (26.7%) stated the

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<sup>135</sup> *Infra* app. B, § III, question III(c)(1)(a).

<sup>136</sup> *Infra* app. B, § III, question III(c)(1)(a).

<sup>137</sup> *Infra* app. B, § III, question III(c)(1)(a).

<sup>138</sup> *Infra* app. B, § III, question III(c)(1)(a). A small minority of the defense counsel (5.1%) indicated that distinguishing between individuals and the corporate entity was not a sound strategy, with one stating that “corporations should primarily present a united front rather than casting away employees.” *Infra* app. B, § III, question III(c)(1)(a). Five participants (12.8%) fell between these two positions, indicating that decisions regarding distinguishing individuals from the corporation to avoid prosecution should be made on a case-by-case basis looking to the effect on the corporation, both in the short and long term, and the “extent of the crime or fraud.” *Infra* app. B, § III, question III(c)(1)(a).

<sup>139</sup> *See infra* app. B, § IV, question IV(a).

<sup>140</sup> *Infra* app. B, § IV, question IV(a).

<sup>141</sup> *Infra* app. B, § IV, question IV(a).

<sup>142</sup> *Infra* app. B, § IV, question IV(a).

<sup>143</sup> *See infra* app. B, § IV, question IV(a).

lack of a strong compliance plan leaves a company vulnerable to criminal activity.<sup>144</sup> While many participants cited the complete absence of a compliance program as a problem, others noted that a compliance plan in name only can be equally problematic.<sup>145</sup> As one participant elaborated, a corporate compliance plan where the head of compliance does not have much power sends a signal that may well encourage fraud.<sup>146</sup>

The third corporate policy participants viewed as encouraging fraud was lack of internal controls. Approximately one-third of the participants (31%) viewed ineffective internal controls as a problem.<sup>147</sup> Companies with a weak and dependent board of directors, lack of external and internal auditors, absence of appropriate checks and balances throughout the company, and a decentralized management structure were noted as being more susceptible to fraud.<sup>148</sup>

The final characteristic mentioned repeatedly by participants as key to whether an organization encourages or discourages fraud was corporate culture.<sup>149</sup> Almost one-fourth of the participants (24%) indicated that when management sends the message that questionable behavior would be tolerated, the corporate environment is prone to fraud.<sup>150</sup>

#### 4. Characteristics of Organizations That Discourage Criminal Activity

The corporate characteristics identified by study participants as discouraging fraud are the flip-side of those that encourage fraud: corporate culture, effective compliance and ethics plans, and strong internal and external controls.<sup>151</sup>

The most consistently noted corporate policy to discourage and prevent fraud, cited by 66% of the participants, was an effective and well-implemented compliance and ethics program.<sup>152</sup> According to the participants, the key components of an effective compliance program are: an anonymous hotline for

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<sup>144</sup> *Infra* app. B, § IV, question IV(a).

<sup>145</sup> *See infra* app. B, § IV, question IV(a).

<sup>146</sup> *See infra* app. B, § IV, question IV(a).

<sup>147</sup> *Infra* app. B, § IV, question IV(a).

<sup>148</sup> *See infra* app. B, § IV, question IV(a).

<sup>149</sup> *See infra* app. B, § IV, question IV(a).

<sup>150</sup> *Infra* app. B, § IV, question IV(a).

<sup>151</sup> *See infra* app. B, § IV, question IV(b).

<sup>152</sup> *Infra* app. B, § IV, question IV(b).

reporting suspect behavior, routine training for employees, proper oversight, and swift punishment of those involved in detected fraud.<sup>153</sup> The second most consistently cited corporate characteristic, identified by almost half of the participants (47.7%), was the “corporate culture” dictated by strong management.<sup>154</sup> A true commitment to compliance and ethical conduct by upper management that permeates all levels of the company was continually cited by study participants as key in ensuring law-abiding behavior within an organization.<sup>155</sup> The third corporate policy identified as characteristic of corporations committed to preventing fraud, identified by one-fourth of the participants (25%), was the existence of strong internal and external controls, including an independent board of directors, outside counsel, and inside and outside auditors.<sup>156</sup>

##### 5. Qualities of Corporate Leaders Who Encourage Law-Abiding Behavior

A strong sense of personal integrity was the theme echoed by most study participants when asked what characteristics a CEO or member of upper management should possess to encourage law-abiding behavior within a company.<sup>157</sup> Over half of the participants (57.8%) indicated that they would look for integrity, honesty, and an intact moral compass when choosing a corporate leader.<sup>158</sup> Some participants expanded these criteria to include a demonstrated commitment to community service or social concerns.<sup>159</sup> One-third of the participants recommended looking to the candidate’s track record, particularly how he or she handled difficult situations or weathered storms in the past.<sup>160</sup> Additionally, there was a recurring theme of choosing a candidate who focused on promoting integrity rather than simply increasing the bottom line; just over one-fourth of the participants (26.7%) cited an emphasis on compliance as a

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<sup>153</sup> See *infra* app. B, § IV, question IV(b).

<sup>154</sup> *Infra* app. B, § IV, question IV(b).

<sup>155</sup> See *infra* app. B, § IV, question IV(b).

<sup>156</sup> *Infra* app. B, § IV, question IV(b).

<sup>157</sup> See *infra* app. B, § V, question V(a).

<sup>158</sup> *Infra* app. B, § V, question V(a).

<sup>159</sup> See *infra* app. B, § V, question V(a).

<sup>160</sup> *Infra* app. B, § V, question V(a).



chief consideration when considering a candidate for upper management.<sup>161</sup>

## 6. Corporate Compliance vs. What Others Are Doing

The majority of participants (60%) stated that, in their experience, emphasizing law-abiding behavior did not sacrifice competitive advantage, especially in the long-run.<sup>162</sup> Of those who did recognize a competitive sacrifice (24%), many indicated that the competitiveness and accepted practices in certain industries, both domestically and internationally, put law-abiding companies at a disadvantage.<sup>163</sup> They suggested that the varying laws and common practices in foreign countries make it more difficult for a law-abiding multinational American company to compete in a global market place.<sup>164</sup> The remaining participants (16%) thought that law-abiding behavior could have a negative impact on a company's overall competitiveness.<sup>165</sup>

The participants who stated that placing a premium on law-abiding behavior does or could sacrifice competitive advantage identified ways to implement a compliance culture without sacrificing competitiveness, at least domestically.<sup>166</sup> These included focusing on the long-run and a benefit-cost analysis of law-abiding behavior, instilling a "broader culture [of compliance with the rules] in the industry as a whole," and finding a "leader who is balanced and ethical."<sup>167</sup> On the other hand, one-fourth of the participants who recognized a competitive disadvantage to implementing compliance efforts (28%) could not readily identify ways to implement these steps without sacrificing a competitive position for a company.<sup>168</sup> As one participant noted, "Sometimes there is not [a way to implement the steps without sacrificing a

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<sup>161</sup> *Infra* app. B, § V, question V(a).

<sup>162</sup> *Infra* app. B, § V, question V(b).

<sup>163</sup> *Infra* app. B, § V, question V(b).

<sup>164</sup> *See infra* app. B, § V, question V(b). Participants suggested that the American concept of fraud differed from the accepted practices in foreign countries, leading to the possibility that an American multi-national company complying with international laws and customs could potentially violate United States anti-fraud laws, while a similar foreign company would go unpunished. *See infra* app. B, § V, question V(b).

<sup>165</sup> *Infra* app. B, § V, question V(b).

<sup>166</sup> *See infra* app. B, § V, question V(c).

<sup>167</sup> *Infra* app. B, § V, question V(c).

<sup>168</sup> *Infra* app. B, § V, question V(c).

competitive advantage] because in some industries the successful competitive position is based on breaking the rules.”<sup>169</sup>

## 7. Salary Incentives and Fraud

Do salary incentives like stock options and bonuses tied to corporate profits provide an incentive to engage in fraud? Participants’ views on this topic varied greatly, from “absolutely” to “no, not in and of themselves.”<sup>170</sup> Almost half of the participants (44.4%) stated unequivocally that salary incentives provide an incentive to engage in fraud; as one participant noted, salary incentives are “a blueprint for fraud.”<sup>171</sup> Other participants (40%) were less adamant but agreed that salary incentives tied to stock options or profits sometimes encourage fraud, but not necessarily in every instance.<sup>172</sup> A common observation by participants was that salary incentives tied to profits should be “counterbalanced with incentives to engage in appropriate conduct.”<sup>173</sup> As one participant stated, “everything should be tied to profits. Dedication to compliance and ethics, however, should also be part of the criteria. There should be a wide variety of factors that go into bonuses.”<sup>174</sup>

### E. Scholarship on Corporate Criminality

The chief characteristic of corporations that encourage and discourage fraud identified by our study participants was consistent with scholarship in the area—namely, that leadership from the top sets the tone for corporate behavior.

#### 1. Internal Board of Directors and Senior Management Team

An independent and active board of directors is the key component identified by the New York Stock Exchange (“NYSE”) and most corporate governance experts as necessary to healthy corporate governance.<sup>175</sup> To help ensure the independence of

<sup>169</sup> *Infra* app. B, § V, question V(c).

<sup>170</sup> *Infra* app. B, § V, question V(d).

<sup>171</sup> *Infra* app. B, § V, question V(d).

<sup>172</sup> *Infra* app. B, § V, question V(d).

<sup>173</sup> *Infra* app. B, § V, question V(d).

<sup>174</sup> *Infra* app. B, § V, question V(d).

<sup>175</sup> See NYSE, INC., LISTED COMPANY MANUAL § 303A.01 (2004) [hereinafter NYSE LISTED COMPANY MANUAL]; see also *SEC v. Worldcom, Inc.*, No. 02 Civ. 4963, 2003 WL 22004827, at \*3, \*20–21 (S.D.N.Y. Aug. 26, 2003) (Corporate Monitor Richard C. Breeden’s report to the Hon. Jed S. Rakoff on Corporate Governance for

directors, some companies require the election of at least one new director each year.<sup>176</sup> Others “declassify” board elections, effectively ending the staggered terms of directors.<sup>177</sup> To further enhance director independence and shareholder oversight, some corporations have switched from a plurality system, where a director need only obtain 20% of the shareholder votes in an uncontested election, to a true majority system, requiring more than 50% of the shareholders’ vote to elect a director to the board.<sup>178</sup>

Boards are also becoming increasingly active in day-to-day operations of corporations. Most corporate governance recommendations for deterring fraud call for an increased number of board meetings, both with and without senior level officers, in order to ensure that the board is aware of the current state of the corporation, as well as the actions of its officers and employees, and can operate without any undue influence by senior management.<sup>179</sup>

In order to carry out this increased oversight, boards are appointing more robust committees that are actively involved in running all aspects of a corporation.<sup>180</sup> Additionally, some

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the future of MCI, Inc.); TASK FORCE ON CORPORATE RESPONSIBILITY, AM. BAR ASS’N, FINAL REPORT 12, 62 (2003), available at [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) [hereinafter ABA REPORT]; Joel Seligman, *A Modest Revolution in Corporate Governance*, 80 NOTRE DAME L. REV. 1159, 1170 (2005); David Henry et al., *The Boss on the Sidelines: How Auditors, Directors, and Lawyers Are Asserting Their Power*, BUS. WK., Apr. 25, 2005, at 86; Carol Hymowitz, *What’s Your Solution?*, WALL ST. J., Feb. 24, 2003, at R.8. Some companies are turning to former regulators and prosecutors to serve as directors to ensure an independent board engaged in active oversight. Judith Burns, *The Cop on the Board*, WALL ST. J., Oct. 17, 2005, at R.8.

<sup>176</sup> See *Worldcom*, 2003 WL 22004827, at \*2.

<sup>177</sup> See William J. Holstein, *Corporate Governance: The Other Elections*, FORBES.COM, Nov. 6, 2006, [http://www.forbes.com/leadership/governance/2006/11/06/leadership-election-boardmember-lead-govern-cx\\_wh\\_1106directorship.html](http://www.forbes.com/leadership/governance/2006/11/06/leadership-election-boardmember-lead-govern-cx_wh_1106directorship.html).

<sup>178</sup> *Id.*; see also *Worldcom*, 2003 WL 22004827, at \*2 (recommending that the WorldCom corporate governance standards be included in the Articles of Incorporation, which would require consent of the shareholders for any amendments to the governance structure or policies, as a way of increasing shareholder oversight).

<sup>179</sup> See *Worldcom*, 2003 WL 22004827, at \*3; NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.03; see also ABA REPORT, *supra* note 175, at 63. Under NYSE requirements, independent directors are regularly meeting in executive session to discuss issues ranging from CEO performance to new ideas for expanding the company. See George Anders, *Private Time*, WALL ST. J., Oct. 9, 2006, at R4; Henry et al., *supra* note 175, at 86.

<sup>180</sup> See *Worldcom*, 2003 WL 22004827, at \*3. The Sarbanes-Oxley Act requires

corporations are now appointing a non-executive chairman of the board of directors.<sup>181</sup> With the increasing concern that “management runs the board,”<sup>182</sup> this separates the CEO from the leadership of the board completely.<sup>183</sup>

## 2. Corporate Policies

For a Board to truly monitor<sup>184</sup> a corporation’s financial status and eliminate incentives for fraud and abuse,<sup>185</sup> the Board’s internal audit committee should regularly review both the company’s financial statements and reports from its independent auditors.<sup>186</sup> Additionally, directors should meet

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an independent audit committee of the board of directors. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–76 (codified as amended at 15 U.S.C. § 78j-1 (2000 & Supp. II 2002)). The NYSE listing standards require companies to maintain within their board of directors a nominating/governance committee, compensation committee, and audit committee, all of which must be comprised of independent directors. See NYSE LISTED COMPANY MANUAL, *supra* note 175, §§ 303A.04–06. Both the Business Roundtable and the ABA recommend the establishment of these independent committees for all companies to facilitate active involvement by the board of directors in key aspects of the company. See ABA REPORT, *supra* note 175, at 63–70; BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 16–17 (2005), <http://www.businessroundtable.org/pdf/CorporateGovPrinciples.pdf> [hereinafter BUS. ROUNDTABLE]; see also *Worldcom*, 2003 WL 22004827, at \*3. Some privately held companies are voluntarily complying with Sarbanes-Oxley and other regulations, often because “compliance is simply a good business practice.” Steven Marlin, *Sarbox Isn’t Just for the Big Guys*, INFO. WK., July 4, 2005, at 49.

<sup>181</sup> See *Worldcom*, 2003 WL 22004827, at \*3; Julie Bort, *Good Governance or Cheap Makeover?*, NETWORK WORLD, Apr. 21, 2003, at 67.

<sup>182</sup> Bort, *supra* note 181, at 67 (quoting litigation partner on the corporate governance of a large New York law firm).

<sup>183</sup> See *id.*; see also *Worldcom*, 2003 WL 22004827, at \*3; Carol Hymowitz, *How to Fix a Broken System*, WALL ST. J., Feb. 24, 2003, at R1. The WorldCom report suggests such a separation with clearly defined duties for both the CEO and the chairman of the board. See *Worldcom*, 2003 WL 22004827, at \*3. “In the board environment, the role of the chairman . . . is to create the kind of open, contributing and questioning environment . . . . The CEO’s role is to speak for management.” Seligman, *supra* note 175, at 1176 (quoting SEC Chairman Harold Williams) (internal quotation marks omitted).

<sup>184</sup> See BUS. ROUNDTABLE, *supra* note 180, at 27, 31, 33; see also *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (noting that first and foremost, directors and officers must assure that a reporting system exists which is “in concept and design adequate” to provide appropriate and timely information to them so that they may satisfy their monitoring responsibility).

<sup>185</sup> See Seligman, *supra* note 175, at 1170.

<sup>186</sup> See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.07(c)(iii)(F); see also *Worldcom*, 2003 WL 22004827, at \*4; ABA REPORT, *supra* note 175, at 28; BUS. ROUNDTABLE, *supra* note 180, at 2, 11, 18–19.

with executives, employees, auditors, and ultimately shareholders to assess internal controls and discover "simmering problems."<sup>187</sup>

To ensure that boards are truly independent,<sup>188</sup> informed and effective, corporations should provide comprehensive orientation programs for new directors,<sup>189</sup> regular training and education opportunities for directors, particularly independent directors,<sup>190</sup> and consistent performance review procedures for directors.<sup>191</sup>

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<sup>187</sup> Kaja Whitehouse, *Move Over CEO: Here Come the Directors*, WALL ST. J., Oct. 9, 2006, at R1.

<sup>188</sup> Companies may take additional steps to ensure that corporate policies support the independent oversight role of the board of directors and strengthen the relationship between the board and senior management. Internal regulations for choosing directors and controlling directors' actions, including strong policies regarding conflicts of interest, corporate opportunities, and fair dealing, are necessary to properly define the roles and relationships between officers, directors, and the corporation itself and to prevent dangerous or damaging behavior and decisions. See *Worldcom*, 2003 WL 22004827, at \*18; NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.10. By reducing the opportunity for "related party transactions," these internal regulations "prohibit behavior that creates the most serious risk to shareholders." *Worldcom*, 2003 WL 22004827, at \*18; see also Elizabeth MacDonald, *Crony Capitalism*, FORBES, June 21, 2004, at 140 (describing how self-dealing adversely affects investors).

<sup>189</sup> See BUS. ROUNDTABLE, *supra* note 180, at 27 ("Common practices include briefings from senior management, on-site visits to the corporation's facilities, informal meetings with other directors and written materials."); see also NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.09.

<sup>190</sup> See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.09 (requiring "[d]irector orientation and continuing education" be addressed in the corporate guidelines for listed companies); see also BUS. ROUNDTABLE, *supra* note 180, at 27; Hymowitz, *supra* note 175; Joann S. Lublin, *Back to School: If Directors Are Responsible for Finding Problems, First They Have to Know Where to Look*, WALL ST. J., June 21, 2004, at R3.

<sup>191</sup> See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.09. The NYSE requires listed companies to include an "annual performance evaluation of the [board]" in the company's corporate governance guidelines. *Id.* Additionally, each of the board's three required committees, nominating/corporate governance, compensation, and audit, should also perform a yearly performance review. *Id.* §§ 303A.04(b)(ii), 303A.05(b)(ii), 303A.07(c)(ii). While these requirements only extend to listed companies, regular performance reviews of directors are a sound practice for companies of any size. See ABA REPORT, *supra* note 175, at 72; BUS. ROUNDTABLE, *supra* note 180, at 28; Lingling Wei, *How Am I Doing? Peer-Based Evaluations Are Moving Slowly into the Boardroom*, WALL ST. J., Oct. 9, 2006, at R5. In addition to self-evaluation, the board should participate in annual performance reviews of the CEO and other senior officers. See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.05(b)(i)(A); see also BUS. ROUNDTABLE, *supra* note 180, at 28.

### 3. Compensation Practices

While some economists are skeptical about the actual impact compensation policies have on corporate fraud,<sup>192</sup> the federal government,<sup>193</sup> private organizations,<sup>194</sup> and scholars,<sup>195</sup> like our study participants, recommended changes to the current practices, including eliminating or reducing stock options as part of the executive compensation package.<sup>196</sup>

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<sup>192</sup> See Bengt Holmstrom & Steven N. Kaplan, *The State of U.S. Corporate Governance: What's Right and What's Wrong?* 9–13 (European Corporate Governance Inst., Finance Working Paper No. 23/2003, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=441100](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=441100).

<sup>193</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 of the United States Code). Under Sarbanes-Oxley, in the event that a company is required to file an accounting restatement due to misconduct, the CEO and CFO are required to reimburse the company for bonuses and any profits from the sale of company's securities during the year preceding the filing of the fraudulent report. *Id.* § 304, 116 Stat. at 778 (codified as amended at 15 U.S.C. § 7243 (2000 & Supp. II 2002)). The law also prohibits insider trading by the CEO or a director during the pension fund blackout periods, *Id.* § 306, 116 Stat. at 779–84 (codified as amended at 15 U.S.C. § 7244 (2000 & Supp. II 2002) and 29 U.S.C.A. §§ 1021, 1132 (West 2007)), and forbids the company from making personal loans to the CEO, directors, or other similarly situated executives. *Id.* § 402, 116 Stat. at 787–88 (codified as amended at 15 U.S.C. § 78m (2000 & Supp. II 2002)).

<sup>194</sup> See BUS. ROUNDTABLE, *supra* note 180, at 24–25. One significant change that has been advanced involves not only the directors in compensation decisions, but also the shareholders. Traditionally, directors have approved compensation packages for the CEO, with shareholder approval for most equity-compensation plans. See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.05; see also N.Y. STOCK EXCH. CORPORATE ACCOUNTABILITY & LISTING STANDARDS COMM., REPORT TO THE N.Y. STOCK EXCH. 17 n.14 (2002), available at [http://www.nyse.com/pdfs/corp\\_govreport.pdf](http://www.nyse.com/pdfs/corp_govreport.pdf). Recently, however, the suggestion has arisen that shareholders approve entire compensation plans for executives, including salary and equity compensation. See SEC v. Worldcom, Inc., No. 02 Civ. 4963, 2003 WL 22004827, at \*3–4 (S.D.N.Y. Aug. 26, 2003); Holstein, *supra* note 177.

<sup>195</sup> See Holmstrom & Kaplan, *supra* note 192, at 10, 12–13.

<sup>196</sup> See *id.* at 10. One of the most controversial compensation arrangements has been the issuance of stock options to executive officers. By providing officers with large volumes of stock options, companies have created an “incentive to manage and manipulate accounting numbers” to increase the value of the company's stock to reap the benefit. *Id.* at 12–13. These stock options are attractive to executive officers because they are liquid and come with few restrictions. *Id.* at 13. They are attractive to the corporation because they are not generally expensed, thus providing a “cost-free” way to increase an executive's compensation package. *Id.* In many cases, however, these options are far from “cost-free,” especially when they lead to inflation of earnings and other forms of mismanagement. *Id.* at 12–13.

#### 4. Corporate Culture

The business world, scholars, and our study participants unanimously identify the corporate culture set at the top<sup>197</sup> and effective compliance programs<sup>198</sup> as essential for any well-run corporation. An effective corporate compliance plan should include a compliance officer who reports directly to the Board,<sup>199</sup>

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<sup>197</sup> See BUS. ROUNDTABLE, *supra* note 180, at 12. By setting a “tone at the top,” senior management and the board can implement a dedication to ethics and compliance that will permeate the corporation, shifting the focus from winning at all costs to “doing the right thing.” See *id.*; see also THE CONFERENCE BD., COMM’N ON PUB. TRUST & PRIVATE ENTER., FINDINGS AND RECOMMENDATIONS 11, 24 (2003), available at <http://www.thecorporatelibrary.com/special/nyse/NYSE-Report.pdf>. [hereinafter COMM’N ON PUBLIC TRUST]. Outward evidence of a corporation’s internal commitment to an ethical corporate culture is best demonstrated by a sound and comprehensive set of corporate governance guidelines, which address qualification standards for directors, directors’ responsibilities and compensation, board access to management and independent advisors, director orientation and education, management succession, and board evaluation. See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.09; see also BUS. ROUNDTABLE, *supra* note 180, at 22–23. The NYSE requires listed companies to not only adopt, but also disclose, their corporate governance guidelines. See NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.09. This is good policy for all corporations, however, regardless of size. See ABA REPORT, *supra* note 175, at 31 n.62; BUS. ROUNDTABLE, *supra* note 180, at 21–22.

<sup>198</sup> See generally Phyllis Plitch, *Blowing the Whistle: Sarbanes-Oxley Requires That Companies Treat Internal Complaints—and Complainers—Seriously*, WALL ST. J., June 21, 2004, at R6; Marc S. Raspanti & Gregg W. Mackuse, *What’s Really So Important About an Effective Compliance Program?*, CHAMPION, May 2007, at 22. The framework for a corporate ethics program begins with the adoption of a code of ethics or business conduct. See Charles Fombrun & Christopher Foss, *Business Ethics: Corporate Responses to Scandal*, 7 CORP. REPUTATION REV. 284, 286 (2004). Not only must the compliance program incorporate the code of ethics, see ABA REPORT, *supra* note 175, at 21; BUS. ROUNDTABLE, *supra* note 180, at 12, 34, but it must promote reporting of unethical or illegal conduct and enforce adherence to the standards through corrective and disciplinary action, see BUS. ROUNDTABLE, *supra* note 180, at 12; COMM’N ON PUBLIC TRUST, *supra* note 197, at 24. Corporations must ensure that systems are in place through which all employees are able to confidentially report questionable behavior they observe. See *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 963 (Del. Ch. 1996); BUS. ROUNDTABLE, *supra* note 180, at 12, 34; COMM’N ON PUBLIC TRUST, *supra* note 197, at 24. Sarbanes-Oxley requires covered companies to adopt a code of ethics for certain senior financial officers or explain why it has failed to do so in submissions to the SEC. See Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 Hous. L. REV. 1, 63 (2003). Additionally, the NYSE mandates approval of a code of business conduct and ethics by listed companies that extends to all directors, officers, and employees. NYSE LISTED COMPANY MANUAL, *supra* note 175, § 303A.10.

<sup>199</sup> A focus on ethics can often be achieved by creating an ethics office and appointing a Chief Ethics Officer that reports directly to the board of directors. See Fombrun & Foss, *supra* note 198, at 286; see also Gaston F. Ceron, *Staying Focused: Corporate Governance May Be Everybody’s Responsibility; But at Some Companies*,

employee training,<sup>200</sup> hotlines for the reporting of unethical or illegal behavior,<sup>201</sup> prompt investigation of potential problems, and disciplinary action, when necessary.<sup>202</sup>

## 5. Internal and External Oversight: Legal Counsel and Auditors

Inside and outside corporate counsel and independent auditors play increasingly important roles in verifying ethical and legal compliance.<sup>203</sup> To perform this task, corporate counsel should meet regularly with the board of directors, particularly the independent directors, to report on any material legal problems or current compliance issues.<sup>204</sup> Boards of Directors,

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*One Person Has More Responsibility than Others*, WALL ST. J., Feb. 24, 2003, at R7. This officer should report directly to the CEO, board of directors, or designated board committee on the ongoing compliance and ethics initiatives, any developing issues, and the status of any known ethical or legal violations. See Fombrun & Foss, *supra* note 198, at 286; see also BUS. ROUNDTABLE, *supra* note 180, at 34; COMM'N ON PUBLIC TRUST, *supra* note 197, at 24.

<sup>200</sup> See SEC v. Worldcom, Inc., No. 02 Civ. 4963, 2003 WL 22004827, at \*4 (S.D.N.Y. Aug. 26, 2003); COMM'N ON PUBLIC TRUST, *supra* note 197, at 24. Some companies may choose to adopt employee training programs for ethics in general, while others focus on disclosure and accounting requirements and standards. *Worldcom*, 2003 WL 22004827, at \*4; COMM'N ON PUBLIC TRUST, *supra* note 197, at 24. Companies may choose to institute a comprehensive ethics training program or address individual ethics issues as they arise. Fombrun & Foss, *supra* note 198, at 285. Companies are also looking to annual ethics evaluations to encourage ethical behavior and monitor the impact education programs are having in the workplace. COMM'N ON PUBLIC TRUST, *supra* note 197, at 24.

<sup>201</sup> See *Caremark*, 698 A.2d at 963; Plitch, *supra* note 198; see also COMM'N ON PUBLIC TRUST, *supra* note 197, at 24 (asserting that companies often find out about unethical behavior too late).

<sup>202</sup> See COMM'N ON PUBLIC TRUST, *supra* note 197, at 24. This commitment to compliance can also be conveyed company-wide by an active oversight role by the board of directors and the CEO. See *id.*; see also BUS. ROUNDTABLE, *supra* note 180, at 34. By appointing a compliance officer, perhaps at the senior management level, the company sends the message that ethical and legal conduct is of chief importance. See Fombrun & Foss, *supra* note 198, at 286.

<sup>203</sup> See *Worldcom*, 2003 WL 22004827, at \*4; ABA REPORT, *supra* note 175, at 14, 20–21; Henry et al., *supra* note 175.

<sup>204</sup> See ABA REPORT, *supra* note 175, at 37–38. Both the ABA and the SEC have taken steps to encourage corporate counsel to report material violations of the law to senior management and the directors. See *id.* at 42–44; Press Release, Sec. Exch. Comm'n, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act (Jan. 23, 2003), available at <http://www.sec.gov/news/press/2003-13.htm> [hereinafter SEC Press Release]. The ABA's Model Rules of Professional Conduct require a corporation's attorney to report illegal conduct to a higher authority in the corporation "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so." MODEL RULES OF PROF'L CONDUCT R.



through their audit committees, should “engage an independent accounting firm to audit the financial statements prepared by management”<sup>205</sup> and should consider rotating outside auditors on a regular basis, such as every ten years, or when concerns about compromised judgment arise.<sup>206</sup>

### F. Trends

All 45 of our study participants described trends they had observed in the years they had been prosecuting and/or defending white collar crime.<sup>207</sup> Collectively they identified four major trends. The most frequently cited trend was an increase in corporate criminal prosecutions,<sup>208</sup> with one-fourth of the participants (24.4%) identifying this as a phenomenon.<sup>209</sup> A minority of participants (11.1%) fleshed this trend out with the related observation that there has been an increase in the criminalization of business activities; what was formerly considered legal activity has, in recent years, been viewed as illegal.<sup>210</sup> Several participants suggested that increased criminalization is a function of Congress’s tendency to pass laws in response to current problems.<sup>211</sup> With high profile corporate scandals such as Enron, Worldcom, and the like, Congress has been unusually active in recent years in passing beefed-up criminal laws aimed at corporate crime.<sup>212</sup> Also, participants noted that civil and administrative regulations have increasingly moved toward criminal litigation.<sup>213</sup>

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1.13(b) (1983). The SEC requires attorneys “appearing and practicing before the Commission” to report material violations “up-the-ladder” within a corporation, including to senior officers and the board of directors. SEC Press Release, *supra*. These requirements serve as another check on the activities of employees and senior management within a company.

<sup>205</sup> BUS. ROUNDTABLE, *supra* note 180, at 2.

<sup>206</sup> See *Worldcom*, 2003 WL 22004827, at \*4; see also COMM’N ON PUBLIC TRUST, *supra* note 197, at 24.

<sup>207</sup> See *infra* app. B, § VI, question VI(c).

<sup>208</sup> See *infra* app. B, § VI, question VI(c).

<sup>209</sup> *Infra* app. B, § VI, question VI(c). Beyond this consensus, there was not a recurring response as to which types of white collar crime are being prosecuted. See *infra* app. B, § VI, question VI(c). A full spectrum was mentioned, including defense spending fraud, disaster spending fraud, public corruption, healthcare fraud, identity fraud, and financial fraud. See *infra* app. B, § VI, question VI(c).

<sup>210</sup> *Infra* app. B, § VI, question VI(c).

<sup>211</sup> See *infra* app. B, § VI, question VI(c).

<sup>212</sup> See *infra* app. B, § VI, question VI(c).

<sup>213</sup> See *infra* app. B, § VI, question VI(c).

The second major trend identified was that white collar crimes and their investigations have become more complex.<sup>214</sup> Participants noted that in today's cases, there is more money at stake, the indictments charge more crimes, prosecutors target more high-profile corporate crime, and prosecutions are more sophisticated.<sup>215</sup> The government is viewed as having more power and resources at its disposal for white collar prosecutions, and prosecutors are viewed as having greater expertise in this area than in years past.<sup>216</sup> Participants also noted that it is more common today to find career prosecutors, perhaps due to the increased specialization in their practices.<sup>217</sup>

Participants' discussion of the increasing complexity of white collar prosecutions brought out interesting differences in federal and state prosecutions. Of the thirty-five participants with experience in both the state and federal arena, thirty-four recognized differences in the two systems.<sup>218</sup> The most frequently cited difference, mentioned by a third of the participants (31%), was the greater amount of resources available in the federal system to prosecute complex cases.<sup>219</sup> These resources included increased investigative powers and time, fewer—but more complex—cases, greater adherence to legal procedure, more capable prosecutors and investigators, and harsher sentences.<sup>220</sup>

The third trend concerns the way in which white collar prosecutions are handled.<sup>221</sup> Participants noted that corporations and individuals have adopted more of a "cooperate and settle" mentality than in the past, due in part to the stiffer sentences that are now being handed down in white collar cases; cooperation is the only reliable way to minimize this exposure.<sup>222</sup> This "cooperate and settle" approach has made corporations more willing, however reluctantly, to conduct their own internal investigations and turn their findings over to prosecutors as part

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<sup>214</sup> See *infra* app. B, § VI, question VI(c).

<sup>215</sup> See *infra* app. B, § VI, question VI(c).

<sup>216</sup> See *infra* app. B, § VI, question VI(c).

<sup>217</sup> See *infra* app. B, § VI, question VI(c).

<sup>218</sup> *Infra* app. B, § VI, question VI(a).

<sup>219</sup> *Infra* app. B, § VI, question VI(a).

<sup>220</sup> See *infra* app. B, § VI, question VI(a).

<sup>221</sup> See *infra* app. B, § VI, question VI(c).

<sup>222</sup> See *infra* app. B, § VI, question VI(c).

of their "cooperation" efforts.<sup>223</sup> Participants noted that "deferred prosecution agreement[s]" are much more common today than in the past.<sup>224</sup> In a deferred prosecution agreement, the Department of Justice ("DOJ") agrees to defer prosecution of a corporation for a specified amount of time, and then, usually, dismiss pending charges, in exchange for an admission by the company that the DOJ could prove its case.<sup>225</sup> Deferred prosecution agreements are available only when a corporation agrees to cooperate fully with the DOJ in its investigation and implement management, reporting, and auditing reforms.<sup>226</sup>

The last trend noted by participants is that prosecutors increasingly are willing to pursue economic wrongdoing through civil remedies rather than relying exclusively upon criminal prosecutions.<sup>227</sup> This may be due to the stiffer sentences that raise the stakes for criminal prosecution, the increased complexity and difficulty of proving white collar crimes, or the increase in civil federal and state whistleblower or *qui tam* cases.<sup>228</sup>

Half of the participants (48.9%) viewed this switch to civil prosecution, particularly against a corporation, as appropriate.<sup>229</sup> These participants noted the severe collateral effects of criminally prosecuting a corporation, including harm to shareholders, innocent employees, and others.<sup>230</sup> Yet, of those favoring civil remedies for corporations, a few (8.9%) viewed criminal sanctions as warranted when an individual was culpable.<sup>231</sup> Even with their clear preference for civil prosecution in many cases, study participants, most of whom are currently defense counsel, did not rule out criminal prosecutions in all cases.<sup>232</sup> A number of participants (13.6%) stated that civil prosecution of white collar crime should not be used to the exclusion of criminal prosecution and that criminal and civil

<sup>223</sup> See *infra* app. B, § VI, question VI(c).

<sup>224</sup> *Infra* app. B, § VI, question VI(c).

<sup>225</sup> See Joshua G. Berman & Michael R. Sklaire, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, LEGAL OPINION LETTER (Wash. Legal Found., Washington, D.C.), June 3, 2005, at 1.

<sup>226</sup> See *id.*

<sup>227</sup> See *infra* app. B, § VI, question VI(b).

<sup>228</sup> See *infra* app. B, § VI, question VI(c).

<sup>229</sup> *Infra* app. B, § VI, question VI(b).

<sup>230</sup> See *infra* app. B, § VI, question VI(b).

<sup>231</sup> *Infra* app. B, § VI, question VI(b).

<sup>232</sup> See *infra* app. B, § VI, question VI(b).

parallel prosecution of a case—both the corporation and individual—should be utilized.<sup>233</sup> These participants noted the need to increase deterrence and incentivize compliance, which can often best be done through criminal prosecution.<sup>234</sup>

### III. CONCLUSIONS AND OBSERVATIONS

There are two key differences in the findings of our study and existing scholarship regarding white collar offenders. The first concerns the descriptions of white collar criminals. The overwhelming majority of our study participants described white collar offenders as generally falling into two primary groups: “leaders” and “followers,” where each group has distinct personality profiles and motives. By comparison, the bulk of existing scholarship lumps all offenders together before dividing offenders into various personality profiles. The view by study participants appears to be more nuanced and likely more reflective of reality. There is, in fact, in most white collar crime, a hierarchy of participants made up of a few leaders and various levels of followers.

The insight that there are two general groups, “leaders” and “followers,” is significant. Followers, who, by their very nature, tend to be passive, naïve, less confident, and non-aggressive people, are more susceptible to deterrence. Effective corporate governance, accepted and adopted by corporate boards and senior management, that educates, monitors, and rewards law abiding behavior is more likely to deter “followers” than leaders simply because of the personalities of followers.<sup>235</sup> This is an important

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<sup>233</sup> *Infra* app. B, § VI, question VI(b).

<sup>234</sup> *See infra* app. B, § VI, question VI(b).

<sup>235</sup> Weston Smith, the Chief Financial Officer of HealthSouth, Inc., who blew the whistle on HealthSouth’s \$2.7 billion accounting fraud, is one example. In the fall of 2002, upon learning of his criminal liability under the recently passed Sarbanes-Oxley Act, Smith decided he wasn’t going to facilitate HealthSouth’s fraud any longer. He walked into the United States Attorney’s Office and revealed everything he knew. Ultimately, Richard Scrushy was acquitted on the fraud charges that resulted from the whistleblowing by Weston Smith and others. Russell Hubbard, “*God Is Good, Scrushy Says After Verdict*,” BIRMINGHAM NEWS, June 29, 2005, at 1A.

Almost one year to the day that he was acquitted on the fraud charges, Scrushy was convicted on federal bribery charges. Michael Tomberlin, *Scrushy “Radioactive” After Trial Business*, BIRMINGHAM NEWS, June 30, 2006, at 6A. Scrushy was sentenced to 6 years and 10 months and ordered into custody upon the rendering of the sentence and before appeals.

finding, because in crime, as in life, there are a lot more followers than leaders. That followers are deterrable means that effective corporate compliance initiatives can make a difference.

The second significant finding in our study is the way study participants described effective corporate governance. Both existing scholarship and our study participants agree on several points. They agree that the key to deterring and detecting white collar crime is effective corporate compliance. Also, existing scholarship and our study participants similarly identify the ingredients of effective corporate governance: an informed, active Board of Directors with an adequate number of outside qualified directors and working committees; an effective corporate compliance plan; and vigorous outside and inside internal auditors.

Our study participants, however, unlike existing scholarship, addressed issues of how effective corporate governance should respond when criminality is suspected. Meaningful internal investigations, the separation of potentially culpable individuals from the corporate entity, full and complete disclosure to law enforcement, and cooperation with government prosecutors were the key steps study participants identified. These are not easy strategies for corporate leadership to take. Only a sophisticated Board that is fully aware of the problems illegal activities can create for a company will be willing to implement these steps. Foot-dragging, delays, obfuscation, and confused leadership can prove fatal to a corporation. The real-life experience of our study participants presumably accounts for this different emphasis than is found in existing scholarship. Because of their experience "in the trenches," our study participants know how quickly corporate criminal investigations can become serious, and therefore, are more attuned to what should be done when trouble is detected.

Our study participants noted the following facts about corporate responses to potential fraud. A full and complete internal investigation is expensive and often highly disruptive. It is time-consuming, expends all manner of resources, and diverts the business from its central corporate mission. A thorough investigation almost certainly will uncover a myriad of issues that will have to be dealt with by the corporation. Wrongdoing may not be isolated to any particular level of a corporation. It may permeate multiple levels of the corporation,

including the CEO, CFO, and the Board. Dealing with the matter at hand and other newly discovered, unanticipated issues, is expensive and can be demoralizing for a company. Similarly, separating potentially culpable individuals from the organization is personally painful, especially when the individuals are colleagues and friends of current or former Board members. And, disclosing and cooperating with government prosecutors is counter-intuitive given corporate strategies in the recent past of "circling the wagons."

Navigating all of these issues requires considerable sophistication. The stakes are high for the company, its workers, shareholders, and sometimes for a town, or even an industry. The stakes are also high for the lawyer coordinating the corporate response. The unwary straddle the fence between malpractice and survival of the corporation.

In comparison to our study, existing scholarship does not address issues of how companies should deal with cataclysmic corporate fraud issues. This points to one of the key insights from our study. The selection of the Board of Directors and corporate leadership should include individuals who have some experience and expertise in fraud deterrence and response. If not, corporate leadership will be ill-suited to guide the corporation through a potential crisis. On-the-job training or a circle-the-wagons approach, which is appropriate for other types of corporate crises, places at risk the existence of the corporation experiencing fraud.

In conclusion, this study offers the following three key insights. First, there are two essential personalities who commit most white collar crimes: "leaders" and "followers." Second, "followers" are much more susceptible to deterrence, which effective corporate governance can provide. This is good news since leaders, who are less likely to be deterred, are far fewer in number than followers. It is also good news because corporate fraud, due to its complexity, cannot occur without help from "followers." Third, corporate Boards and leadership should include qualified individuals with real life experience and expertise in deterring and responding to corporate fraud crisis.

APPENDIX A  
 DEMOGRAPHICS OF RESPONDENTS  
 BY RESPONDENT

Respondent #	White Collar Crimes Prosecuted or Defended	Non-White Collar Crime Prosecuted or Defended	Years of Experience	Current Legal Position	Prior Legal Positions	Non-Legal Employment	Top 25 Law School*
1	Healthcare fraud, defense procurement fraud and public corruption	Very little	27	Defense Attorney	US Navy JAG, Federal Prosecutor	N/A	No

2	Emphasis on tax fraud, but also antitrust charges, bank and credit charges, bank fraud, business misconduct, embezzlement, healthcare fraud, Medicare fraud, price-fixing, RICO	N/A	40	Defense Attorney	N/A	N/A	No
3	All types of fraud	N/A	32	Defense Attorney	Assistant US Attorney	N/A	No



4	Healthcare fraud	Some general commercial litigation	27	Dept. of Justice, Civil Division	Federal Clerkship, Private Practice, Assistant State Attorney General	N/A	No
5	Healthcare fraud, environmental and toxic torts, antitrust, white collar criminal defense, defense procurement fraud	All crimes that prosecutors handle - drugs, murder, etc.	26	Defense Attorney	US Attorney	N/A	No

6	<p>All types of fraud, security charges, enforcement issues, defense contracting fraud, environmental fraud, and Foreign Corrupt Practices Act violations</p>	<p>All crimes that prosecutors handle - drugs, murder, etc.</p>	<p>32</p>	<p>Defense Attorney</p>	<p>Federal Clerkship, US Attorney</p>	<p>N/A</p>	<p>Yes</p>
7	<p>Corporate fraud, securities fraud, pharmaceutical fraud, environmental fraud, insurance fraud</p>	<p>All crimes that prosecutors handle - drugs, murder, etc.</p>	<p>25</p>	<p>Defense Attorney</p>	<p>Department of Justice, Assistant US Attorney</p>	<p>N/A</p>	<p>Yes</p>

8	All types of fraud	All crimes that prosecutors handle - drugs, murder, etc.	27	Defense Attorney	N/A	N/A	No
9	Tax fraud, mail fraud, wire fraud, money laundering	All crimes that prosecutors handle - drugs, murder, etc.	33	Defense Attorney	Federal Clerkship, Assistant District Attorney, Assistant US Attorney	N/A	Yes
10	Heavy emphasis on tax fraud, but also healthcare fraud, securities fraud, anti-trust issues, etc.	N/A	40	Defense Attorney	Assistant US Attorney, Assistant Attorney General	N/A	Yes

11	Healthcare fraud, False Claims Act charges, procurement fraud, public health and pharmaceutical compliance fraud	International trade, general litigation, business disputes	22	Defense Attorney	N/A	N/A	Yes
12	Healthcare fraud, securities fraud, customs fraud, tax fraud, mail fraud, and wire fraud	Very little	30	Defense Attorney	Assistant US Attorney	N/A	No

13	Business fraud, securities fraud, federal anti- kickback prohibitions, government procurement requirements, foreign corrupt practices rules, campaign violations	All crimes that prosecutors handle - drugs, murder, etc.	35	Defense Attorney	US Attorney	N/A	Yes
14	Defense procurement fraud, healthcare fraud, and tax violations	All crimes that prosecutors handle - drugs, murder, etc., as well as espionage, major economic cases with executives	30	Defense Attorney	Assistant US Attorney	Teacher	No

15	All types of fraud, except for securities fraud cases; emphasis on healthcare cases	Terrorism and customs crimes, postal theft, weapons and drug trafficking	22	Assistant US Attorney	Private Practice	N/A	Yes
16	Healthcare fraud, securities fraud, bank fraud, bribery, conspiracy associated with those charges	General litigation including breach of warranty, civil fraud, breach of contract, construction litigation, employment litigation	24	Defense Attorney	Assistant US Attorney, District Attorney	FBI	No
17	All types of fraud	All crimes that prosecutors handle - drugs, murder, etc.	40+	Defense Attorney	US Attorney	Marine Corps	No
18	Economic business offenses	All crimes that prosecutors handle - drugs, murder, etc.	38	Defense Attorney	N/A	N/A	No

19	Civil and criminal litigation in the healthcare industry, with an emphasis on antitrust and fraud and abuse issues	All crimes that prosecutors handle - drugs, murder, etc.		Defense Attorney	Department of Justice, Assistant US Attorney	Professor	Yes
20	All types of fraud	Very little	28	Defense Attorney	Department of Justice, Assistant US Attorney	Computer Programmer	Yes
21	All types of fraud	All crimes that prosecutors handle - drugs, murder, etc.	25	Defense Attorney	Public Defender	N/A	No
22	Healthcare fraud, bank fraud, defense fraud, environmental fraud	N/A	20	Assistant US Attorney	Private Practice	N/A	Yes

23	All types of fraud	Some organized crime cases	18	Defense Attorney	Department of Justice, Assistant US Attorney	N/A	No
24	Environmental criminal cases	Some street crime	28	Defense Attorney	Department of Justice	N/A	Yes
25	False Claims Act violations, healthcare fraud, government procurement fraud	N/A	29	Qui Tam Attorney	Assistant Attorney General, Assistant US Attorney	Senator's office	Yes
26	Bank fraud, healthcare, securities, tax, mail fraud, environmental crimes, anti-trust	Very little	34	Defense Attorney	Assistant US Attorney, US Attorney	N/A	No



27	Healthcare fraud, False Claims Act charges, corruption, tax fraud, bribery	All crimes that prosecutors handle - drugs, murder, etc.	18	Defense Attorney	Department of Justice, Assistant US Attorney	N/A	No
28	Healthcare fraud, defense procurement fraud, and other types of procurement fraud	Breach of contract, various tort claims involving businesses, partnership disagreements, and employment cases	22	Qui Tam Attorney	Federal Clerkship, Department of Justice	Congressional Budget Office	Yes
29	Everything from civic corruption to stock fraud and Medicare fraud	All crimes that prosecutors handle - drugs, murder, etc.	58	Defense Attorney	N/A	Military	No

30	Emphasis on healthcare fraud, but also securities fraud, government contracting fraud, consumer fraud, conspiracy, and mail and wire fraud	All crimes that prosecutors handle - drugs, murder, etc.	29	Defense Attorney	Federal Clerkship, Assistant District Attorney, Deputy US Attorney	N/A	Yes
31	False Claims Act, business torts and fraud, medical malpractice, civil RICO, products liability, and labor and employment fraud	N/A	20	Qui Tam Attorney	Federal Clerkship	N/A	Yes

32	Emphasis on defense contract fraud, healthcare fraud, tax fraud, and securities fraud	All crimes that prosecutors handle - drugs, murder, etc.	31	Defense Attorney	US Attorney	Federal Reserve	Yes
33	Bank fraud, government program fraud, IRS violations which include foreign bank account violations, fraudulent tax shelters, and money laundering	Drug cases, some postal service crimes and counterfeiting	27	Defense Attorney	Assistant US Attorney	Editor	No

34	Bribery, public corruption, bank fraud, securities violations, obstruction of justice, perjury, FDA violations, espionage, civil fraud, conspiracy, theft of trade secrets, and SEC and other administrative enforcement actions	All crimes that prosecutors handle - drugs, murder, etc.	30	Defense Attorney	Department of Justice	N/A	Yes
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35	Savings and loan fraud, healthcare and consumer fraud, securities fraud, public corruption, RICO	All crimes that prosecutors handle - drugs, murder, etc.	20	Defense Attorney	Department of Justice	N/A	Yes
36	Government investigations, internal corporate investigations, false claims, healthcare fraud	All crimes that prosecutors handle - drugs, murder, etc.	17	Defense Attorney	Federal Clerkship, US Attorney	N/A	Yes

37	FDA violations, healthcare fraud, anti-kickback violations, tax fraud, money laundering, etc.	All crimes that prosecutors handle - drugs, murder, etc.	29	Qui Tam Attorney	Circuit Court Clerkship, Federal Prosecutor	N/A	No
38	All kinds of fraud, public corruption, and money laundering	General civil litigation	27	Dept. of Justice	State Clerkship	Military	No

39	All kinds of fraud including white collar defense, healthcare fraud, securities fraud, tax fraud, and defense procurement fraud	All crimes that prosecutors handle - drugs, murder, etc.	15	Defense Attorney	Assistant District Attorney	Banking	No
40	Tax fraud, securities fraud, government contract fraud, money laundering, organized crime, extortion, mail fraud, bribery	All crimes that prosecutors handle - drugs, murder, etc.	37	Defense Attorney	Department of Justice	Auditor Investigator with the Government Accounting Office	Yes

41	Healthcare fraud, securities fraud, election fraud, bank fraud	N/A	30	Defense Attorney	US Dept. of Health & Human Services	Journalist	No
42	Primarily healthcare, but also environmental fraud, government procurement, tax fraud, securities and antitrust fraud	All crimes that prosecutors handle - drugs, murder, etc.	29	Defense Attorney	Assistant US Attorney, Private Practice, Department of Justice	Brookings Institute researcher	Yes



43	<p>Government procurement fraud, anti-fraud provisions of the securities and commodities statutes, false claims, insurance and bankruptcy fraud, Foreign Corrupt Practices Act charges, export control licensing requirements and technology transfer regulations infringements, tax fraud, criminal antitrust enforcement, healthcare fraud, environmental enforcement</p>	<p>All crimes that prosecutors handle - drugs, murder, etc.</p>	<p>39</p>	<p>Defense Attorney</p>	<p>Federal Clerkship, Private Practice, Assistant US Attorney</p>	<p>N/A</p>	<p>Yes</p>
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44	Public corruption, fraud, and tax violations	All crimes that prosecutors handle - drugs, murder, etc.	26	Defense Attorney	US Attorney, Department of Justice	N/A	No
45	Civil fraud, criminal fraud, debarment, and exclusion federal fraud cases	N/A	34	Defense Attorney	Department of Justice	N/A	No

\* Top 25 ranking is per 2007 US News & World Report.

APPENDIX B  
SURVEY OF RESPONDENTS' DETERMINATIONS  
BY RESPONDENT

SECTION	DEFINITION
<b>I</b>	
<b>Question I</b>	<b>How would you define the term "white collar criminal"?</b>
1	It is primarily someone whose criminal conduct is tied to the performance of his or her profession.
2	It is someone who commits a non-violent, non-drug related crime or activity which the government has made into a crime.
3	It is someone who has committed an offense of a non-violent, usually economic nature exclusively.
4	It is someone who violates those laws that deal with financial institutions, and is typically a mover and shaker of the business sector who violates the laws to his or her benefit.
5	It is someone engaged in a non-violent criminal act for some financial gain usually in a business or commercial context.
6	It is not a precise term but is really intended to distinguish between someone who commits common law crimes of violence and other crimes.
7	It is someone who commits a financial crime without using violence or the threat of violence.
8	It is someone who commits an offense that occurs in the practice of business.
9	It is someone who commits a crime other than a street crime and more like a tax offense.
10	It is someone who commits business crimes.
11	It is someone who has violated laws involving regulatory or accounting types of non-violent matters.
12	It is someone involved with a business crime that is a non-violent, non-drug offense.

13	There are two categories. The first is someone who commits a non-violent fraud, which can run from boiler room operations trying to get money from old people to forgery and things like that. The second is someone who commits business fraud, which is the more sophisticated kind.
14	It is someone who commits a crime in a business setting, not street crime, and is employed by a business.
15	It is someone who commits crime in an office setting, including everything from an auditor to a CEO.
16	It is someone who commits a non-violent, non-drug related crime involving mostly papers, and who is in a position with fiduciary responsibilities.
17	It is someone who commits a crime that centers generally around allegedly corrupt business practices.
18	It is someone who commits a crime that is economic in nature and does not involve violence or passion.
19	It is someone engaged in fraudulent activities, in violation of the law, that don't result in physical harm to a victim.
20	It is someone who commits a crime with a pen as a weapon without force or violence.
21	It is someone who commits a financially motivated crime involving transactions that is not a street crime and not a crime of violence.
22	It is generally someone of relatively high social standing who commits a legal violation in the course of his occupation.
23	It is generally a business person performing some act for financial gain unrelated in any way to violence.
24	It is someone who is in management and is a decision-maker. It is anyone other than a street criminal.
25	It is someone who commits a financial crime, just as the name implies.
26	It is someone who commits a non-violent, non-street crime.
27	It is someone who has offended a regulation or a state or federal statute that involves fraud.

28	It is someone who commits a crime involving the theft of money through means other than the threat of violence or physical burglary.
29	It is someone who commits a business-related crime.
30	It is someone who is convicted of engaging in regulatory or business crimes.
31	It is someone who commits a business crime, a crime that is non-violent and more economical.
32	It is someone who violates the law through use of non-violent means.
33	It is someone who commits a non-violent crime for financial gain.
34	It is someone who commits a non-violent criminal activity that is usually business related.
35	It is someone who is involved in crimes committed in a business setting, as part of a business transaction.
36	It is someone who commits non-violent offenses that are generally related to business transactions.
37	It is someone who has committed a violation of law in any one of certain enumerated crimes such as tax fraud, stock fraud, etc. The Department of Justice provides a specific definition.
38	It is someone who commits theft of money or property by non-violent means.
39	It is someone, generally speaking, who has committed a type of fraud case and who has money.
40	It is someone who commits a financial or economic crime where the objective is to obtain money.
41	It is someone who engages in fraudulent and deceptive activity that can take the form of a transaction, submission of claims, or deceiving other parties for financial gain.
42	It is someone who commits crime in the business setting.
43	It is someone who commits business fraud.
44	It is someone outside of a labor-type position who has used deception or fraudulent techniques to gain an advantage of some sort.

45	It is someone who engages in conduct that is otherwise legal but is illegal based on the laws of the state or federal government.
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SECTION II	IDENTIFYING CATEGORIES OF WHITE COLLAR CRIMINALS
Question II(a)	<b>Based on your experience and using your definition, do you believe it is accurate to view white collar criminals as falling into two basic groups: principals/architects and facilitators/followers?</b>
1	Yes.
2	Yes.
3	You cannot categorize it because there are so many people who are unique. Sometimes people fall into a pattern and may be the more culpable person, but sometimes there is not a well-defined architect. Generally, the public perceives the white collar offender as a greedy executive who sets out on a path to violate the law, but typically it is someone who gets involved in conduct that gets beyond him or her. They usually get involved for a variety of reasons. Some people are cheaters and have always been cheaters and get caught. More typically, it is someone who starts by cutting corners and then violates a few more rules and regulations and starts down the slippery slope toward a criminal offense.
4	Yes, but in addition there are businesses that incentivize bad conduct by trying to make the company as profitable as possible. This incentivizes conduct that leads to crime. For example, a pharmaceutical company may expect its sale representatives to make X dollars in a year by pushing a particular drug, which indirectly encourages the sales representatives to then on their own engage in illegal conduct to meet those goals.
5	Generally speaking, yes. Sometimes people move from being a follower to becoming a principal.
6	In most white collar cases there are always one or more people who are the major players and others who go along with the program, but there is not a sharp distinction between the two. There are always people who are guiltier than others.
7	Yes.

8	There is not that clean of a line. Decisions are made by clusters of people in the business setting.
9	Yes, but there is a third category that consists of those who violated the law but did not know they were doing that.
10	Yes.
11	Yes, that is pretty fair.
12	Not really because neat classifications do not apply in many cases.
13	No. There is more of a spectrum than that. There are some people who are sophisticated leaders and those who are followers, but there are other kinds of fraud where there is the boss who is making the most money and underlings making less money and so forth, with different gradations of responsibility. This gets back to those two different types of fraud—con artists and business fraud.
14	Yes.
15	I have never really thought about it, but that is probably fair.
16	Yes.
17	That is probably accurate. It is similar to the sentencing guidelines, which includes organizers, leaders, and minimal players.
18	Yes, probably.
19	A brightline distinction has some validity, but it is often a blurred line in specific investigations.
20	Roughly yes.
21	Yes.
22	Not exactly. There are 4 separate groups. The instigators/designers, the outside professionals (lawyers, accountants, and others who turn a blind eye or participate), internal people with some standing in the organization (allow it to happen or participate; in a position to stop it but do not), and the low-level employees.
23	Yes, that is probably fair.
24	Yes.



25	Yes, but there are also those people who cover up the crime and the people who retaliate, such as whistleblowers.
26	Probably.
27	Yes.
28	Yes, but it is not that easy to make the distinction because a typical scenario involves an organization that is financially driven at the top and focused on reaching targets that are not necessarily manageable. The top manager may not know, and he may or may not care. So is the person at the top a follower? Probably not, but it is still difficult to distinguish from a principal.
29	Yes, though it depends upon the white collar crime that is being charged.
30	No, that is an over-simplified view of the world.
31	Yes.
32	Yes, but there is also a third group—people who unwittingly get involved in it and then seize the opportunity. This individual sees his contemporaries, or people he identifies with, doing well financially, and that they are taking advantage of an opportunity that exists. They are motivated by peer comparison and think that it cannot be so bad if everyone is doing it and the opportunity is there.
33	Yes.
34	Yes, but there are also those who are willing to testify on behalf of the government in exchange for lenient treatment, and there are corporate executives who just work there and who are not facilitators or otherwise.
35	Yes, but this is true of every enterprise, including street crime and lawful transactions.

36	That is one way to divide them, but you could probably divide any criminal enterprise that involves multiple actors into those two categories. The white collar world can be divided into two categories, one being the people with institutional authority (the leadership) and the other being people on the front lines (the ones making the deals). Principals and followers can be found in either category.
37	Yes.
38	Yes, but perhaps it is more that there is a group of essentially good people who make mistakes on the one hand and perpetuate those mistakes, while another group consists of corrupt people who by virtue of education can do it without violence. They get into it and there's no way out, plus they get used to the money.
39	Yes, I suppose so.
40	There are not really followers. Instead, a lot of people may assist the scheme, often times unknowingly, and once they do it knowingly they become principals.
41	Yes.
42	Yes.
43	No, it is difficult in business fraud to distinguish between a lead person and people who assist by not coming up with the idea but rather by executing it. White collar business fraud tends to involve people getting into a frame of mind and doing certain things in concert. It tends to be more of a conspiracy, using that word loosely. It is difficult to distinguish between the higher ups and people lower in the conspiracy. Those involved tend to work in concert, so there are less gradations than there are in street crime. Unlike a street crime, fraud is much more complicated.
44	Yes. There may be co-equals in a situation, but basically yes.

45	No. Much of white collar crime starts out innocently and either a group of people figure out it could be wrong or figure out how to use it in a different way. Rarely is it only one person or only at one level of the company. Occasionally there will be people who take it too far.
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<b>SECTION II IDENTIFYING CATEGORIES OF WHITE COLLAR CRIMINALS</b>	
<b>Question II(b)</b>	<b>If yes, then in your opinion, why do principals/architects engage in criminal acts?</b>
1	It varies. Some people are fundamentally amoral and tend to have narcissistic personalities and do not view their conduct as criminal. However, most people just make poor judgments.
2	They do it for a variety of reasons, but if there is one overriding reason it is plain greed. They want to get ahead, make money, accomplish something, and they are willing to bend the rules to do that.
3	N/A
4	The most obvious answer is that it is because of money, but desperation and the arrogance of power (which makes these criminals think they are smarter than everyone else and won't be caught) can also cause such criminal acts.
5	Money, profit, greed, power, and general financial gain are all motivators. Sometimes the fear of losing what they have or the fear of financial distress allows them to justify in their own minds what they are doing with the belief that they have not crossed the line into criminal behavior. Often they do it to gain a competitive advantage of some type for the company or themselves.
6	N/A
7	They do it for money, because of greed, because of their ego, and sometimes out of fear of failure.
8	They are generally motivated by what they think will help the business appear more prosperous than it is. Often it revolves around ego more than greed. They are attempting to justify decisions and go too far trying to make them or their business look successful. Often they do it unintentionally because it is not clear that it is a crime.
9	It is impossible to figure out. For some of them it is because of greed, but that is not across the board and it takes a psychiatrist to determine the various motives.

10	They do it out of greed.
11	There are three possibilities—financial gain, career advancement, or an insufficient understanding of the law.
12	There are many different reasons, including pressure to achieve positive financial results quarter after quarter and other economic decisions. They engage in criminal activity to gain some type of advantage because they think it is necessary or desirable.
13	N/A
14	They do it primarily for the money.
15	They do it to get money.
16	It is because of greed, sometimes poor judgment, and sometimes a false sense of power and control.
17	Greed is the number one reason. They often have the mentality that there is never enough money. Also, ignorance, lack of sensitivity, and naïveté play a role. Flexible and elastic criminal laws that leave a lot of leeway can create a reason for committing white collar crime because the person does not know he or she is doing anything wrong.
18	There are a number of reasons, including greed, desperation, and general acceptance in business. For some, they do it because it is a generally accepted practice in the industry, not an intentional criminal activity.
19	They do it to make money and promote their status in life.
20	There are people who are sociopaths and want vast amounts of money. But a large number of people do it because they experienced a setback in business and tried to turn it around, which led to fraud.
21	The main reason is for financial gain. For some it is an act of desperation that they do not recognize as criminal. They have built a successful business and are in desperate shape trying to save the business and they overextend themselves thinking it will all work out in the end. They do not view it as a crime and think there will be no victims because they will pay everyone back in the end.

<p>22</p>	<p>Greed is a reason, but it is not the whole story. There is also a game aspect and it becomes a challenge. They also do it because of the power and influence associated with it. The final piece is moral blindness. They adopt the attitude that “everyone is doing it” and that is how the world works.</p>
<p>23</p>	<p>There are a number of reasons, including greed, competition, and superiority—believing the law does not apply to them.</p>
<p>24</p>	<p>They are often motivated by profits and other shortcuts to regulatory or statutory restrictions on an activity.</p>
<p>25</p>	<p>They engage in criminal acts out of greed, because there is an opportunity, and the system is either not regulated or not regulated heavily enough to prevent such acts. The pressure particularly for publicly traded companies to perform, to grow revenues, meet shareholder expectations, etc., also causes such criminal acts. There may also be a lack of fear of getting caught, but that goes back to how much law enforcement there really is. They engage in a risk-reward analysis, and if the risk of getting caught is not very great or the consequence is not so bad, they will do it.</p>
<p>26</p>	<p>It runs the gamut from those who know what they are doing is wrong and think they are not going to get caught to the ones who do it but rationalize it by saying that everyone else is doing it, so why not (like speeding). There are those who appreciate that it is wrong but rationalize it out of business pressures and demands to satisfy shareholders, superiors, or directors. There are those who know what they are doing is wrong but think there is some action they can take in the future to make it alright. Then there are those who know it is a gray area and are not sure if it is right or wrong but are willing to take the risk.</p>

27	Almost always, they do it because they see an opportunity to take advantage of someone or something. For example, they see an opportunity to defraud or steal from a person or take advantage of a regulatory scheme. It is almost always about money—saving it, obtaining it, or retaining it.
28	They do it for money and power.
29	Even though they would deny it, the reason is greed. The money out there that can be obtained is the fuel that drives the engine of the scheme.
30	N/A
31	It is usually for financial or positional gains. They are trying to move up the corporate ladder or increase their bonuses, or both.
32	It is a combination of greed and opportunity.
33	There are two types of principals. First, there are those people who might be labeled by psychological experts as sociopaths because they do not have the same ethical belief system that others generally have. They think they should have whatever they want and can use whatever means to get it, and they are singularly unconcerned with the impact of their behavior on others. Second, there are people who have been very successful in their line of work and who find themselves in a circumstance where it looks like they will not succeed, so they start cutting corners and thinking that they will make a comeback and make it right. It gets out of control and goes on for so long that they get to the point that the balls in the air come crashing down.
34	A lot of them do not believe that they are engaging in criminal acts, particularly in the corporate arena. These tend to be aggressive individuals who feel they can do things their way, that they are not violating the law, or they are not concerned about violating the law. The personality of the corporate executive is one who is aggressive, arrogant sometimes, and believes he knows the way to do things. Money is a factor in espionage cases, but there are other factors such as resentment by those individuals of the FBI or CIA, which motivates them.

35	They do it for a variety of reasons. First, often the lines are not very clear or bright. Sometimes society rewards people for pushing the envelope and then sends mixed messages by prosecuting that behavior. Second, society condones a great deal of impropriety without making it criminal and people may not realize that they are exposing themselves to criminal sanctions when they cross the line. Third, human beings are not perfect and people may become blind as to where the line is. Fourth, some people just have evil intent.
36	They generally have some financial incentive to do so, either an ownership interest in the company, an incentive arrangement, or institutional aspirations or career advancement goals. Many are also worried about keeping their jobs and are managing to a number (trying to hit a certain performance goal).
37	It is definitely because of the greed factor. Even though they make lots of money, it's not enough and they want more. They already have power and they want more money.
38	They engage in such acts for money.
39	They do it for a variety of reasons, including greed, arrogance, sense of entitlement, and thrill-seeking.
40	They engage in such criminal acts to obtain money.
41	Greed certainly is one important motivating factor. Ignorance can also be a motivating factor, especially where they have no true insight into where the lines are drawn and what the rules of the road might be, which is not a-typical.
42	Sometimes it is because of greed and financial gain. Sometimes it is to advance short-term business objectives even if it does not necessarily mean immediate financial gain, or any financial gain at all. Sometimes it is just mistakenly believing that it is a legitimate business transaction that happens to violate the law. Sometimes there are relatively innocent motives but by themselves are caught up in breaking the law.
43	N/A



44	Greed is a primary motivator. But other reasons include status and the need for something where one event leads to another.
45	In general, most people who commit white collar offenses decide that they have the right to operate very close to the line. There are two ways that can end up in real criminal conduct—they move to the other side of the line into illegal conduct, or what they are doing stays the same and the line gets moved (by the government).

<b>SECTION II</b>	<b>IDENTIFYING CATEGORIES OF WHITE COLLAR CRIMINALS</b>
<b>Question II(c)</b>	<b>Have you seen a typical personality type for principals/architects? Any common personality or demographic traits?</b>
1	Not really. Some tend to be amoral and narcissistic.
2	They tend to be risk-takers. They are just basically doing business that has an illegal feature about it, and they know that, but they do not view it as anything other than business.
3	No.
4	They are definitely arrogant and tend to be men more often than women.
5	They tend to have confidence, a determination to succeed, and often a willingness to disregard reality in order to justify their actions. Demographically there are no common factors.
6	N/A
7	They have very large egos, are very narcissistic, have an inflated sense of self, and are generally very charismatic and smart.
8	In general, the typical personality trait is intelligence. As for demographic traits, they tend to be white males who are generally conservative, patriotic, law-and-order types who are critical of the criminal justice system until they get mixed up with it. They tend to be upper-middle class.
9	No.
10	They are people who are willing to take a risk, but the line between what is criminal and what is not is not always clear.
11	No.
12	Yes and no. They tend to be professional, intelligent people who sometimes think they are too intelligent or think they are smarter than they really are. Usually they do not view themselves as criminal or exposed to criminal penalties.
13	N/A
14	No.

15	They tend to be people who do not think they will get caught or that the rules do not apply to them. They think they can ignore the rules or get around them.
16	They are individuals who are highly successful, articulate, have advanced in their careers, and get into it for the wrong reasons, some just to cover up mistakes.
17	Not really. As in anything else, leaders tend to have certain leadership characteristics.
18	No.
19	There are relatively few African Americans. White collar offenses are generally committed by people in upper level positions. A lot of defendants are Jewish.
20	There is no one personality trait or type in white collar crime, but there is a tendency to claim it is always someone else's fault.
21	They are largely Caucasian and male.
22	They generally have relatively high social standing—middle class or above.
23	Not really, except that they all tend to be educated and are normally responsible.
24	They are individuals who have otherwise been successful in their endeavors but who believe the restrictions do not apply to them or if they do apply, then by virtue of the success they have enjoyed they will overcome and be able to explain their activities if they get caught.
25	They are arrogant and think that they will not get caught, but there are no common demographic traits.
26	No. It pretty much covers the spectrum of educational background, gender, etc.
27	Not really. Principals seem arrogant or reckless. Also, men are much more likely to commit white collar crime than women.
28	No.
29	A Type A personality is likely to be a violator more than a withdrawn individual because it requires planning and action.
30	N/A

31	They tend to be Type A personalities, usually pretty aggressive, and self-confident.
32	No.
33	They tend to be highly educated white males with Type A personalities who have previously been very successful. Examples include bank presidents, other lawyers, accountants, and public officials.
34	They are greedy, have superior attitudes, believe that they are above the law, and that they know better than anyone else.
35	They are people who have been more likely to succeed in business endeavors. They have risen through the ranks and are mostly self-made. They tend to be entrepreneurs, risk-takers, and overachievers.
36	They all have leadership qualities. They tend to be people who have a strong dictatorial approach to management and do not like others to question them or their decisions.
37	They are usually very successful, bright leaders in companies who are lacking in moral character. There are no consistent demographic traits.
38	They tend to be take-charge people, and they are usually people with good levels of education, typically college graduates. They are people who could be your next-door neighbors.
39	They tend to be almost all upper-middle class white men in their 40s and 50s. They have a common personality trait of high intelligence and are often easily deluded into thinking what they were doing was not a crime.
40	They are greedy and cunning. They also have a tendency to wonder why the government picks on them. They feel victimized when under investigation.

41	There certainly is the principal who just has a criminal mind, who more or less knows what he is doing and meets the standard of intent in criminal law. The more frequent personality type is the kind that is described as someone who believes there is a shortcut to every goal, and believes that there is a way to cut corners and get where you want to be. Then there are those people who do it out of necessity to meet other obligations, and that is like those who engage in intentional conduct but they may not have the true criminal mind. The other category is someone who does not recognize the dangers of conflict of interest. Many fraud cases start with some underlying conflict of interest and from that grows a whole pattern of activity.
42	No. Like the rest of the human condition, they run the gamut.
43	N/A
44	They usually have a strong ego and confidence that they are smarter than their peers. They appear to be strong personalities. They are people who convince themselves that they are doing right. For some, there is a psychopathic component.
45	They are political prisoners.

SECTION II	IDENTIFYING CATEGORIES OF WHITE COLLAR CRIMINALS
Question II(d)	In your opinion, why do facilitators/followers engage in criminal acts?
1	Generally, they feel pressure to do so.
2	In most cases they are worried about their jobs or they are true followers and believe in what they do. They did not think it up or set it up, but they believe in it enough that they are willing to go along with it.
3	N/A
4	They are incentivized to do so to make more money, they are convinced of the rightness of their cause, they think this is the only way they can compete in the marketplace, they fear that they will lose their job if they do not do it, and they are not assertive enough to say no.
5	They do it for many of the same reasons as principals, for example the financial gain, however, they are often motivated by a confidence in the principal or a sense of intimidation by the principal. They fear losing their jobs or feel they have no choice. Sometimes they do not have the full information and go along for other reasons. Often they have been promised something in return—either a piece of the action, a financial gain, or a commitment that the principal will take care of them.
6	N/A
7	They do it out of greed, but also to be part of the group mentality and because they are too weak to say no or because they will be steamrolled if they do. They may be afraid of losing their jobs, or they may think they can advance their own careers by doing what the leader wants.
8	N/A
9	Each one is different.
10	They do it out of greed, and because they are risk-takers.

11	They do it because of a fear of retribution, for career advancement, and/or because of a lack of understanding of the law.
12	N/A
13	N/A
14	Loyalty is the best word for it. They turn a blind eye to the consequences out of loyalty, and they may also fear being terminated.
15	In the corporate context, those lower on the totem pole do it to curry favor or advance their career. They are also often concerned about losing their jobs. In another context, the follower might really like the principal and see it as a way to get more money. For instance, they believe they are hitching their wagon to the rising criminal star and will get benefits from it.
16	They do it because of concerns over their job, threats, poor judgment, and to a lesser degree greed. Most often it is because they do not have control over the whole pie most of the time. They get caught up in it to keep their job, make their bosses happy, and for longevity with their occupations.
17	They do it generally for the same reasons that principals do it. Greed is the main reason, including wanting a bonus, a bigger salary, or fear of losing a job. They often have a bravado or belief that they will not get caught.
18	They do it because of greed, maintaining a job, or because it is the general business practice of the industry.
19	They do it as a way to make money and promote their status.
20	For many reasons, many followers think they are not doing something bad because it is just something they do at work and they are not personally profiting. Others simply do not see it as wrong. Often, people do their jobs and go home and are not necessarily thinking about what they are doing as a crime. Then after a while, they are in so deep there is nothing they can do about it.

21	They do it for a variety of reasons. Some can engage in it without understanding it because it is more complex than they can comprehend. They think they are doing nothing wrong and are only minimally involved because their actions are trivial or ministerial. Sometimes they are doing a personal favor for someone. There is almost never a great financial motive for followers.
22	They usually do it because they feel like this is their life and they need the position to support their families and lifestyle.
23	They generally do it for the same reasons as the principal—greed, competition, and superiority.
24	Often it is the result of enhancing their status or maintaining their current status. There is pressure to do what they otherwise would not do by virtue of the instructions or subtleties of a principal encouraging them to do so.
25	They are afraid of retaliation or bodily harm (particularly if unions are involved), and they have the incentive of getting promoted and achieving personal gain. There are also some who simply may not know how wrong it is and think that if the higher ups are saying to do it then it must be ok.
26	Usually they do it because they think that if they don't, their superiors are going to give them such a difficult time that they are willing to run the risk and take the out that "I was directed to do it and had no choice." They think the career advancement is worth the risk.
27	They do it for many reasons, but mostly to align him or herself with the principal.
28	They fear losing their jobs and they are unable to believe that the company they work for would be violating the law. They respect the authority of the company.



29	There are two answers. One is that they do not know any better and they are kept deliberately ignorant, and the other is that they are duped or befuddled. In the hierarchy of our life, employees are very much inclined to accept almost as gospel that which is told to them by an employer.
30	N/A
31	They engage in those acts either to go along, to get along, or because they feel that they have to in order to keep their jobs.
32	They do it to please, to get along with, or to benefit from the principal.
33	There are three types of facilitators. First, there are sociopathic personalities who do not think it is wrong. Second, there are people who get taken in by the charisma of the main perpetrator, particularly in instances when the principal is one of these sociopathic personalities and tends to be charismatic. They are gullible, do not use common sense, and do not look at things objectively. Third, there are those who, because of personal circumstances, are desperate financially and would not do these things ordinarily.
34	They feel that if they do not obey the instructions of their superiors they will be replaced, and by following the orders of their superiors, they earn more money and positions in corporations that are of significance. A lot of them will say that they would have been fired had they not followed their instructions.

35	They do it for the same reasons as the principals. They do it for a variety of reasons. First, often the lines are not very clear or bright. Sometimes society rewards people for pushing the envelope and then sends mixed messages by prosecuting that behavior. Second, society condones a great deal of impropriety without making it criminal and people may not realize that they are exposing themselves to criminal sanctions when they cross the line. Third, human beings are not perfect and people may become blind as to where the line is. Fourth, some people just have evil intent.
36	Sometimes, especially in antitrust cases, it amounts to sheer laziness. Other reasons include an institutional fear where they do not want to say "no," a financial incentive in that they do not want to be fired, they want to get ahead or get a direct financial gain, or some particular loyalty to the principal.
37	They engage in such acts because that is the nature of their mindset. They are followers anyway and this is just one more way to follow. Usually the brains behind these schemes are bright and very influential, and it is easier for these people to fall into the fold. They tend to follow the supervisor types and not their peers. Many of these people do it because they are followers and not because they will benefit financially.
38	They also do it for money. However, it could be that they are drawn into it and are just saving their jobs and preserving their positions. At other times they try to get a piece of the action, but as soon as they start taking the money greed enters into it.
39	A lot of times it is because they are weak people.
40	N/A
41	They do it out of greed, naïveté, not understanding the rules of the road, denial, or if they facilitate something, the promise of a reward that can compensate for some other issue they need to address.

42	They go along with some superior thinking that legitimizes what they are doing. Someone above them directs how things will go and they follow along thinking that somehow significant harm cannot come to them because they are following the leader.
43	N/A
44	The person they are following is in a position of authority and their personal advancement may depend on them doing what the principal wants. They may share some of the same aspirations and they may be frustrated with their advancement. They may also have the mentality that "everybody is doing it."
45	N/A

<b>SECTION II IDENTIFYING CATEGORIES OF WHITE COLLAR CRIMINALS</b>	
<b>Question II(e)</b>	<b>Have you seen a typical personality type for facilitators/followers? Any common personality or demographic traits?</b>
1	They tend to be followers who are perfectly comfortable being in a subordinate role and accepting the rewards.
2	They are not as aggressive and they tend to be people who do what they are told to do. Sometimes they are willing to go along for reasons that do not have anything much to do with the project, but they just like the individuals leading the scheme. They are the kind of people who just go along and do what they are asked to do or what they perceive they need to do to carry about their part of the deal.
3	None.
4	No, it cuts across all lines.
5	They are generally easily manipulated and used by the principal. They tend to be less independent. However, there are no common demographic features.
6	N/A
7	No. They range from very ambitious people who think they will get advanced to those who are very weak and just follow.
8	N/A
9	No.
10	There is no common demographic, but they all want to score and punch in with those who are leading the way. The almighty buck motivates them; however, the motive in healthcare crimes is different—it may not be money that motivates. But where money is the end result, it is greed.
11	No.
12	N/A
13	N/A
14	They are usually more passive than the principals.

15	Usually they are people who will act without questioning.
16	No. They are all over the board.
17	No.
18	No.
19	N/A
20	They generally have "follower" personalities and tend to be more employee-minded than entrepreneurial. Sometimes they are family members or others who have misguided loyalties for various reasons.
21	They are largely caucasian, largely male.
22	They are usually hard workers, high school graduates, and want more money and more responsibility.
23	Not really. Sometimes they have some type of personality weakness or a follower mentality in general.
24	They are usually those who do not feel there is any other option available to them and they succumb to pressure.
25	No.
26	No.
27	They tend to lack courage and have a follower mentality. They do not think for themselves and are easily manipulated. They have a blind allegiance and are meeker and less secure in their ability to peel off from the scheme or resist.
28	No, but they are more common than whistleblowers. It takes a real unusual person or event to create whistleblowers.
29	No. They are dominated because they are in the position of being subject to it because of their employee status, not because of a particular personality trait.
30	N/A
31	They tend to be more Type B personalities. They are afraid to go against the grain of what is expected of them by their bosses.

32	They have a weakness of character and are unable to say no.
33	They are gullible.
34	They are more subservient, not quite as aggressive, and are more prone to follow orders rather than give them. They are not initiators.
35	They tend to be less likely to be leaders in anything, including their family, job, and social life. They are more insecure and feel like they have fewer choices.
36	They tend to be a more diverse group with different personality types. It is less likely that they will have a strong personality. They are usually people who want to get along and do not want to make waves. They want to keep their job and usually have less initiative or ambition.
37	They are certainly the less confident, less independent types who are dependent on others. There is not a common demographic trait.
38	Just as with principals, they are usually people with good levels of education, typically college graduates, and they are people who could be your next-door neighbors. However, these are also people who are weak but basically otherwise well-meaning. They allow themselves to get caught up and do not say no to criminal activity under the guise of it being sharp business practice.
39	They tend to be people who do not accept responsibility.
40	N/A
41	They are not distinguishable from architects except that they may be facilitators instead of leaders.
42	No, other than that by definition of position they are a follower so they are more passive than the person orchestrating the crime.
43	N/A
44	They have a weaker personality type and are more easily persuaded. Since they are not the originator of the idea, then they think they are somehow less culpable and are just following directions. They have a more pliable personality.
45	N/A

<b>SECTION III</b>	<b>PROSECUTING ORGANIZATIONS</b>
<b>Question III(a)</b>	<b>What percentage of the white collar cases that you've been involved with concerned organizations/corporations as defendants, targets, or potential defendants/targets?</b>
1	100%
2	100%
3	50%
4	90%
5	50%
6	75%
7	Nearly 100%
8	Minimal
9	33%
10	50%
11	99%
12	80%
13	80%
14	0%
15	80%
16	50%
17	Several
18	75-85%
19	100%
20	Minimal
21	25%
22	Significant number
23	90%
24	80%
25	90%
26	Large percentage
27	50%
28	100%
29	50%
30	95%
31	0%
32	20%

33	0%
34	Minimal
35	Handful, mostly individuals
36	85%
37	90%
38	0%
39	33%
40	20–30%
41	60–70%
42	75%
43	80%
44	50%
45	100%



<b>SECTION III</b>		<b>PROSECUTING ORGANIZATIONS</b>	
<b>Question III(b)</b>		<i>Prosecutors</i>	
<b>(1)(a)</b>		<b>What were/are key considerations to you in deciding whether to prosecute corporations?</b>	
1		I tried to determine if what was being represented constituted corporate culture or just the conduct of a few individuals.	
2		N/A	
3		There is a palpable difference in attitude from US Attorney office to US Attorney office. I looked to the individual and not the corporation because despite people's best efforts, an offense may occur. Also, if you charge the executive and the corporation, then the jury may come back and say the corporation is guilty and then find the executive not guilty. It is easier to find the corporation guilty. That is a reason not to charge the corporation.	
4		We are worried about having proof that in fact it was a corporate scheme (it went far up the chain and the board knew or should have known of the bad conduct). Criminal prosecutors consider whether the people who really suffer are the shareholders of the corporation and whether they should be penalized for the bad behavior of the corporation. They often consider deferred prosecution agreements to avoid such scenarios.	
5		I looked at the nature of the crime at issue—how serious it was and how pervasive the wrongdoing was within the company. If it was a big company with only a few bad actors, then that would mitigate against prosecuting the company. Also, whether the corporation had some sort of compliance program in place affected the prosecution and whether it was a real effort at compliance. I also considered whether the company had allowed the fraud to continue or disregarded or ignored the actions of its employees.	

6	I prosecuted mostly individuals and only a very few corporate cases. But in those days prosecutors exercised more discretion than they do today. The seriousness of the crime, whether or not the individual had a prior criminal record, and what the consequences of the prosecution might be were all considerations.
7	Key considerations were how high up the conduct went, how pervasive it was, if there were previous sanctions, what the corporate culture was like (good corporate citizen or not), and how it reacted to investigation (whether it cooperated or put up more roadblocks).
8	N/A
9	We only prosecuted individuals.
10	We did not prosecute many corporations.
11	N/A
12	I was not interested in prosecuting corporations by and large. By punishing the corporation, we would punish shareholders who had no role in the fraud. Additionally, the shareholders at the time of the prosecution were not necessarily the shareholders during the criminal activity. Prosecuting the corporation does not result in much deterrent value because individuals commit the acts. Deterrence efforts are best focused on individuals.
13	The key consideration was whether there was involvement at the top of the corporation.
14	I considered the level to which they were complicit in the criminal activity and whether there was deliberate ignorance where they would not take steps to reign in employees who were doing bad things.
15	I consider whether the corporation benefited and if the participants involved in the criminal activity were upper-level managers. If it only involved lower-level employees who were not in a position to direct the corporation, then it is unlikely that I will prosecute the corporation. If upper-management is involved and they are in a position to direct the company, then I am more likely to prosecute.

16	I looked at what impact charging the corporation would have on the existence of the corporation, the community, and the employees.
17	I looked at how pervasive the conduct was, how high up the corporate ladder it went, and what the corporation did. A key consideration was whether the corporation worked with the government, even before the Thompson Memo. It depends on who is doing the wrongful conduct.
18	N/A
19	We considered whether we could obtain a conviction as the main factor.
20	I looked at whether the corporation was riddled with bad things or whether some people had committed the crime in question. I focused on the pervasiveness of the wrongful conduct.
21	N/A
22	I look at the McNulty Memo and the series of factors contained in it. In the health care arena, if an entity is indicted it is excluded from participation in the Medicare program. Therefore, I have to consider that effect. Also, whether the company has an effective internal compliance program is a very persuasive factor when deciding not to prosecute a corporation. Also, how pervasive the fraud was—how far up in the corporation the wrongdoing went—is also important. I also consider what the corporation did after the fraud was discovered.
23	First, I looked to see if a crime was committed and if the defendant committed it. Second, I considered whether I would be able to present sufficient evidence to make me reasonably comfortable that a conviction would ensue.
24	I considered if they had an understanding of what the law prescribes and their willingness to do it anyway. I looked to see if there was a failure to institute procedures that would have uncovered or stopped the activity. I also considered the pervasiveness of the activity in the corporation.

25	How high up the misconduct went and who had knowledge (collective knowledge as to corporations applies) were key factors. We looked for knowledge going as high up in the organization as possible, or at least acquiescence or looking the other way.
26	I was more concerned with the prosecution of individuals and would only prosecute the corporation if it was clear that the action was rampant throughout the organization.
27	I looked at the intent to the extent I could divine it. I would prosecute if the corporation or the people involved knew (not just that they should have known). It was very important that they absolutely knew it was wrong. Statutory wrongness was not good enough. The person had to do something inherently wrong and the corporation had to know about it.
28	I consider whether they have money, whether the alleged fraud was a clear violation, whether the violation causes substantial monetary harm to the US, and whether there was an ancillary harm to the US (threat to health and safety of public, military, threat to reputation of the country).
29	N/A
30	We looked for criminal intent.
31	N/A
32	We consider whether there is enough information to show that people within the organization each have a little bit of knowledge and that they know what they did was a violation of the law. All the factors can be combined to show that if everyone had a little knowledge, the corporation can be prosecuted on the basis of what everyone collectively knew. If there is not enough information to pursue an individual or if what they did alone was not an offense, then prosecutors go after the corporation. On other occasions there might be enough evidence against one person.

33	I did not prosecute corporations, but the strength of the documentary evidence, whether the defendant had a plausible explanation for the conduct (innocence), whether the behavior was repetitive, and what his conduct was once he became aware of the investigation (if we uncovered evidence that he was trying to influence other witnesses or destroy documents) were all factors for prosecuting individuals.
34	There was not much emphasis on prosecuting organizations. There are guidelines now that the Department of Justice has published suggesting that corporations can be prosecuted if they do not cooperate fully with such investigations. I think those are wrong-headed and I hope they will be amended, but I did not have those factors in front of me, and as a defense attorney I very much resent the government's attempt to indict corporations just because the corporations want to fight.
35	I was not actively involved in the decisions, but we looked at whether there was a bright line between legal and illegal conduct established by society and if the corporation stepped over that line.
36	I was very faithful to the Department of Justice's guidelines and the Thompson Memorandum.
37	Those were set forth by the Department of Justice, which had minimums such as a certain amount of loss (substantial), and certainly there were exceptions if the behavior violations were something that needed to be made an example of to deter bad conduct. The crime had to exceed a certain level of loss or the case would be sent to the state or handled in another manner.
38	The factors that are in the sentencing guidelines and include the culpability of the corporate entity, pervasiveness, how high up it goes, overall harm (is it physical or monetary harm), and how endemic to the corporate structure is the criminal activity. If it is really heinous we might charge individuals.
39	N/A

40	Prosecuting corporations was very rare. There would have to be an overriding motivator for the government to prosecute a corporation, such as collection of taxes, seizure of assets, etc.
41	We did not prosecute many corporations back then. That was not a common prosecutorial practice in health care.
42	There was less of a willingness to prosecute corporations based on straight respondeat superior theory, and there was greater emphasis on truly wanting to find evidence that would link someone high in the company directly to criminal conduct.
43	The emphasis was to avoid going after a company because that harmed more people than not going after the company, so we tried to resolve it civilly rather than criminally. We might get them to agree to an SEC enforcement action instead because otherwise people other than the culprits would be harmed. It was more important to be more imaginative. The idea was not so much punishment as it was to create a remedial environment.
44	The degree to which the conduct was sanctioned by the company was important. Also, I considered whether the conduct of the employee was outside the scope of his responsibilities, which would mitigate against charging the company. If it appeared that there was collective knowledge and a number of high level employees were aware of the conduct, that would favor prosecution.
45	N/A

SECTION III	PROSECUTING ORGANIZATIONS
Question III(b)	<i>Prosecutors</i>
(1)(b)	<b>Was/Is there a career impact from the choice of cases that are taken?</b>
1	Absolutely—a positive one.
2	N/A
3	In some way there was. I was one of the first people to enter the private practice with an expertise in white collar crime, so it had little impact on me. However, now there is a greater chance that a high profile prosecutor will go into private practice at a good law firm.
4	No, because we have almost all of our cases driven by whistleblowers. They file complaints under the False Claims Act, and the government has a set period of time to investigate. If we choose not to go forward, the whistleblower can go forward with the allegation. We review cases very seriously and do not have the luxury of picking and choosing what comes in the door.
5	No.
6	Yes. High-profile cases that bring the prosecutor to the public's attention are either career boosters or breakers depending on how he or she performs.
7	Taking one type of case over another did not seem to advance my career because I prosecuted all kinds of cases, many of which were high profile cases.
8	N/A
9	Yes, it can create a niche practice for the prosecutor.
10	Prosecutors enjoy high profile cases because they get press and can have an impact on deterrence.
11	N/A
12	Absolutely.
13	No.
14	No.
15	The high profile prosecution of corporations can benefit a prosecutor's career.

16	Yes, most prosecutors would love to be involved in a high profile case because they know that handling a case like that and doing a good job gives significant exposure. Whether or not that translates into advancement in a career inside or out of the prosecutor's office, the exposure has an impact on professional standing.
17	Yes. The higher the profile of the case, the more credit the prosecutor gets.
18	N/A
19	Yes, there can be a career impact, especially if you want to take a case that your supervisors do not want to.
20	Yes.
21	N/A
22	Yes—both positive and negative.
23	Sure.
24	Yes—in a positive way.
25	Yes, it can create an expertise that carries over into private practice.
26	Probably.
27	Yes.
28	Not generally.
29	N/A
30	Yes. For example, I do not do cases involving violent crime and that is a conscience crime. I have always had a focus on business and regulatory violations on both the civil and criminal side.
31	N/A
32	It is important when hiring someone to know whether they can generate business, which is affected by the choice of cases they take as prosecutors.
33	There were people who took particular cases in the hopes that it would have an impact, but they were in the minority.
34	Yes. The types of cases one prosecutes may develop into a niche that becomes a primary source of business once one moves to private practice.



35	Of course, every lawyer's career is defined by the cases he or she is involved with.
36	I did not think about it that way. That never crossed my mind.
37	The headliner cases would help if the prosecutor was successful, but frankly there was enough for everyone, so that alone would not be why someone was promoted.
38	Yes, but it is career impact in the sense of enhancing publicity and visibility, and of developing an expertise. No one chooses white collar cases simply for career purposes.
39	N/A
40	No. Prosecutors frequently did not have a choice of cases. Investigative agencies came in with a case and the Department of Justice had to handle it.
41	Yes. A prosecutor can develop a reputation for handling particular cases and become high profile as a result.
42	Yes. There is more visibility with higher profile cases. Prosecutors who gain experience working on complicated corporate fraud cases are more likely in the private practice to work in those areas than prosecutors who spend most of their careers working on drugs or other crimes.
43	Yes. The higher the profile of the case, the more impact it has on what will happen to the prosecutor with respect to future job prospects (in private practice).
44	Yes.
45	N/A

SECTION III	
PROSECUTING ORGANIZATIONS	
Question III(b)	<i>Prosecutors</i>
(1)(c)	<b>Was/Is there a career impact from the outcome of cases you prosecute(d)?</b>
1	Yes, a positive one.
2	N/A
3	Yes, but less so. Many times the prosecutions are high profile regardless of whether you win or lose.
4	No. Some prosecutors have lost big cases and they are still given high profile cases. Prosecutors lose cases most often not through incompetence but other issues that come into play. Messing up by not doing one's homework would have a career impact, but the government does not have bonus programs for good results.
5	It could have an impact, especially if it is a high profile case. However, if the prosecutor does a good job and acts fairly, then the outcome of the case matters less.
6	It is not just so much whether the prosecutor wins or loses, but rather it is coming to the public's attention by virtue of a high-profile case. However, having a lot of success on top of that makes a difference. It helped my career that I won a couple of very big cases and my name got out there.
7	No.
8	N/A
9	No, because it was the same as it is now. The government wins 80-90% of the cases, and everyone is supposed to win their cases.
10	No.
11	N/A
12	Not necessarily, but if you mishandle a high profile case it can have a career impact.
13	No, because most prosecutors win their cases.
14	The more successful the prosecutor, the more cases come through the door.

15	Absolutely. If a prosecutor brings a lot of cases and loses them all, then it is a poor reflection on his or her judgment and will hurt his or her career.
16	No. Prosecutors win the vast majority of their cases, and if they do their job most of the time they will be successful. A slip up here and there will not have a significant impact on their career unless they do a really poor job or their ethics are questionable.
17	Yes, at least as to the notoriety of the prosecution.
18	N/A
19	Yes. If you win, it is positive. If you lose, it is negative.
20	Probably. If you lost a huge case, there could have been a career impact.
21	N/A
22	There is some impact. If you lose a trial, it can really hurt your career.
23	If you continue to lose there would be a negative impact.
24	The outcome does have some impact.
25	Yes, though the impact was largely on the reputation one developed inside and outside of the office. Prosecutors who did well got awards.
26	If you lost a huge case, that could have a career impact.
27	No.
28	Absolutely. There is a large range of cases and prosecutors have to decide what cases to pursue with little interference by their supervisors.
29	N/A
30	No.
31	N/A
32	As long as it is not a tremendous debacle, it does not matter if you win or lose, though it is always better to win.
33	No.
34	Yes, there is a career impact. In fact I think prosecutors think on those terms, although I think the majority assesses the case as to its merits.
35	Yes.

36	N/A
37	Yes. It does help to get convictions, so to a certain extent there is a career impact, but not to a huge extent. It all depends on knowledge and experience, particularly since there might have been a good reason why convictions were not secured.
38	Yes. Anyone would think that is true over the long-run, even though it is rare for a single loss to be singularly important.
39	N/A
40	Absolutely. There were attorneys who consistently lost cases and they were advised to go somewhere else. I prosecuted a very high profile case and was promoted solely because of that.
41	No, not really because representing the federal government in the early 1980s generally resulted in favorable verdicts, but even then winning or losing in that capacity did not affect one's career.
42	These days there are people who tend to stay in the government longer, and being successful leads to opportunities if they stay. Now it is more likely that if prosecutors want to leave, they can as an attractive candidate.
43	Yes, if they are big cases the prosecutors become known and start getting other big cases, so they are likely to do well when they leave the government.
44	Yes.
45	N/A

SECTION III	PROSECUTING ORGANIZATIONS
Question III(c)	<i>Defense Counsel</i>
(1)(a)	<b>In your opinion, what strategy should target organizations pursue to avoid prosecution? Do you recommend distinguishing corporations from culpable individuals? Is that a wise public policy?</b>
1	Corporations need to generally try to convince the government that prosecuting the company would have an adverse impact on innocent people and there are alternatives to prosecution. Corporations have to distinguish themselves from individuals because it is consistent with the obligation to the corporation to put the company first.
2	Cooperation is a strategy which enables the corporation to say that this is not something the company is about, that these people acted without any authority, and that the company is willing to do everything to make it right. To make this defense one would really have to show that the company was a victim and that the company did not benefit from the crime. Distinguishing corporations from culpable individuals is difficult because it is impossible to have a corporate intent that is formulated any other way than by the officers and employees. The government generally pursues individuals and the higher up the individual is, the better the prize. If it gets the individual it will also get the company. There may be an aberrant situation where there is an officer who acted without the knowledge of the corporation and with no connection to it, and that separating the two might be appropriate, but for the most part what the government is interested in is individuals.

3	<p>The corporation has no rights. When the government tells a corporation that they are investigating it, the corporation has to tell the government it will do anything to help them and then do whatever the government wants. Based on the factors in the Thompson Memo, the corporation has to show that it did everything to evidence cooperation and avoid indictment, including firing culpable people. If the government indicts the company anyway and it is a health care entity, it should plead guilty and try to work out a deal to avoid Medicare debarment. The corporation should work with prosecution to try to get the company the best deal. The primary goal of a prosecutor should be to bring culpable individuals to justice and not to always go after the corporation.</p>
4	N/A
5	<p>They need to make contact with the prosecutor through counsel and try to learn as much about the nature of the investigation and the concerns of the prosecutor as possible. They should open a good line of communication with the prosecutor's office and take the initiative to convey that the company is going to quickly evaluate if it is in a position to cooperate and then move down that path. The company does not have to turn over everything mentioned in the Thompson Memo at that point, but the best way to ensure a corporate entity will not be indicted is to move towards cooperation. It needs to move down the path slowly and give the government information after careful consideration about what to disclose. There is also a need to distinguish between the corporate entity and the culpable individuals to avoid indictment of the entity.</p>
6	<p>Publicly held corporations today have no choice but to cooperate with the government by sharing the findings of their internal investigations and firing employees who committed a wrong. They cannot afford to take the risk of not taking some kind of deal, even if that means accepting a corporate plea.</p>

7	Corporations and culpable organizations are typically distinguished and corporations do not generally get prosecuted. It is appropriate to prosecute corporations if they are not responding appropriately, but prosecution should usually be of individuals, though there are times when it is good public policy to prosecute the company. If it is a federal case, the Department of Justice has guidelines and the corporation should be familiar with what those guidelines suggest companies should do in those situations. They should do their best to adhere to them and make sure they are not running afoul of too many of them.
8	They should make a disclosure immediately and get an independent investigation started by a respected law firm, headed by someone with integrity beyond reproach. They should also self-report.
9	Corporations must be distinguished from individuals, and now corporations are forced to waive their privileges so they have to cooperate enough to avoid prosecution.
10	Every case depends on the facts, but generally prosecutors are against throwing individuals to the wolves. Corporations should be defended separately if that is what the facts indicate is appropriate.
11	That question cannot be answered in the abstract because it depends on the case. Sometimes cooperation with the government helps and sometimes it becomes a huge penalty. It depends on the circumstances.

12	<p>It boils down to corporate cooperation with the government. A corporation that cooperates stands the best case of avoiding prosecution, including internal investigations and waiving attorney client privilege. As for distinguishing between individuals and corporations, it becomes a difficult decision for a corporation because the government wants everything and does not want the corporation to protect individuals. However, turning over individuals creates a huge problem for the corporation from the functioning point of view. The corporation must run a business and people have to feel secure. Today corporations and people are spending an enormous amount of time covering themselves and worrying about liability, which makes it difficult to run a company.</p>
13	<p>If there is a large company, publicly held, it must almost always be separated from culpable individuals. But when it is a private company where the company and its owner have very similar interests, this may not be appropriate. Large corporations can be distinguished from individuals and earn credit for taking remedial steps, but when the company and the owner are almost one and the same, that strategy cannot be used.</p>
14	<p>Today the strategy is complete and total cooperation. Corporations and culpable individuals should be distinguished.</p>
15	<p>N/A</p>
16	<p>Organizations should have very strong compliance programs, very involved compliance officers, consistent training, and consistent recognition by the management that fraudulent activities will not be tolerated within the organization. Distinguishing corporations from culpable individuals is a good strategy.</p>



17	They should conduct an internal investigation and determine whether the conduct was actually committed and punish the culpable employees. They should improve their code of ethics and the teaching of the ethics code. Additionally, they should cooperate with the government.
18	They should seek outside counsel in the criminal field.
19	Generally, maximum cooperation with the government is necessary. Also, maximum effort to comply with applicable laws and regulations is important. Too little attention is paid to prosecuting culpable individuals as opposed to leveraging the cooperation into making a large financial settlement.
20	It depends on the type and size of the company. Some large companies are able to make an argument against prosecution based on their size ("too big to fail") or the strength of their compliance program. Small companies are much more likely to be prosecuted because they lack economic and political power. Basically, corporations should put a strong compliance program in place, get everything in order, behave well, and demonstrate to the government that they have done well and worked to correct the problem.
21	Cooperation with the government is a ticket to prison. They should hire good counsel, investigate the situation, find out what happened and then tell the government what they are missing.
22	N/A
23	There are so many variables. It depends on the substance of the offense and the procedure. For instance, whether or not you can affect the outcome can depend on when you are contacted. Also, corporations should primarily present a united front rather than casting away employees.
24	They should make sure there is a strong compliance plan in place that is sincere and intended to ferret out wrongdoing. They need to send a clear message from the top that wrongdoing will not be tolerated and respond accordingly.

25	Yes, it is important to distinguish corporations from culpable individuals to try to show those were isolated incidents and that there was no knowledge or approval from upper management. Corporations want to try to show that they had a corporate culture and policies that promoted and encouraged honesty and compliance, that employees were trained in that, and that any wrongdoing was taken care of internally.
26	Hopefully the board of directors and senior executives would not be involved, so they could point to lower level employees doing something outside the scope of their employment. The corporation should distance itself from the activity and the culpable person(s) and claim no knowledge or encouragement of it.
27	Corporations should act in their own self-interest by identifying the problem and deciding what the corporation would do under ordinary circumstances, absent the threat of criminal prosecution, and then pursue that strategy. It is a mistake to cooperate with the government immediately and may not be in the long-term best interests of the company. Complete cooperation and supplication may be necessary if the corporation is a public company, but it should not automatically be the first step. The decision to distinguish between culpable individuals and corporations depends on the extent of the crime or fraud. However, society should not deputize corporations by requiring them to investigate their employees.
28	N/A
29	Distinguishing corporations from culpable individuals is a wise policy, particularly when dealing with public corporations because otherwise there are truly innocent people being hurt in a horrible fashion. The threat of prosecution of the corporation tends to keep those who are working there in line because they can lose a lot if the corporation goes down.

30	<p>They should have an effective compliance program. They should also use their lawyers as lawyers and listen to their lawyers. Distinguishing corporations from culpable individuals is a wise public policy because the whole experience with some recent prosecutions suggests that many innocent people get very badly hurt when the government fails to distinguish between the two.</p>
31	<p>Corporations should be distinguished from culpable individuals. Also, it makes sense for the corporation to cooperate with the government as quickly as possible, to conduct internal investigations and, if appropriate, turn over the results, and to start remedial measures before the government has taken action (create own compliance programs, fire those who need to be fired, etc.).</p>
32	<p>It depends on what stage the litigation is in. If the question is how to avoid getting prosecuted, do not violate the law. And it depends on for whom you are advocating, the corporation or the individual. Frequently corporations are really an individual, and there is no benefit from making the corporation take the hit. If it is a big corporation, it is important that the US Attorney and the SEC do not proceed. If it is announced that there is an open investigation regarding securities fraud, the corporation will get hit with derivative lawsuits, making the corporation a target and if it is convicted or pleads guilty, it will lose those lawsuits. At that point it would be important to keep the corporation from pleading guilty or being convicted because then the shareholders will be hurt by the wrongdoing of one or a few people. In those instances it might be best to navigate the litigation so the corporation takes the hit because the corporation cannot go to jail and the bad press will go away. Depending on the circumstances, if it is a large corporation it is best to strongly recommend ways to keep the prosecution from securing a conviction.</p>

33	It is critical that they conduct their own internal investigation of the conduct and use outside lawyers to conduct that investigation who are not lawyers that the company normally uses. Whether or not to distinguish corporations from individuals depends on how pervasive the conduct is and how far up the hierarchy the people are. This is an area where prosecutors have to exercise sound discretion because of the potential impact on employees and investors who are innocent.
34	The basic strategy is to try to persuade the prosecutor that the indictment of the corporation will cost a lot of innocent people their jobs and their livelihood. Some companies and lawyers work very closely with the prosecutor and, in effect, tell individuals in the corporation that the corporation will pay legal fees only if those individuals cooperate. These are not particularly good strategies because corporations should have the right to defend themselves.
35	The company needs to respond quickly, accurately, and cooperatively. The company needs to have a wide disclosure program and a process for reviewing corporate actions. The corporation must show that the entity is independent of the people.
36	They have to get their arms around the issue as soon as possible and act in the corporation's best interest, especially if it is a public company. The corporation ought to be in dialogue with the government to resolve the situation in a non-criminal manner. Cooperation with the government is a significant component to get the government to decline prosecution or use a civil remedy or to convince the government to go after the individuals. Pursuing the culpable individuals as an alternative to prosecuting the company is the right approach. This can be more difficult in a closely held company if it is controlled by the individual the government believes is the principal wrongdoer.
37	N/A
38	N/A

39	In most instances, the corporation ought to determine the extent of the culpability and try to protect itself, even if it means throwing the culpable people out. The notion of a company circling the wagons and protecting wrongdoers is risky.
40	It is important to distinguish the corporation from the individual, particularly if it is large, because the impact of prosecution on a corporation can be large on innocent people. This is not a consideration when individuals are involved. Generally there are more effective tools that can be used to force a corporation to comply with the law, and penalize them (administrative fines) that cannot be used on individuals. So yes, it is wise public policy to use a great deal of discretion when prosecuting a corporation.
41	It is important to look at in each case, at least initially, a strategy of cooperation with the government authorities and cleaning the corporation's house. That is a balancing act that should be done on a case by case basis. It is nearly a fait accompli to engage in cooperation and investigation of the corporation's own wrongdoing and then get credit for cleaning up. Distinguishing corporations from culpable individuals is the general play in most circumstances.
42	Distinguishing corporations from culpable individuals is a strategy that can be important. It shows where the law is on corporate criminal responsibility, and more importantly it points out harm that will come to shareholders even if there is a bad apple individual that can technically hold the corporation liable.

43	Companies have to be extremely proactive, being very assertive in compliance and in governance and in discovering violations. They must disclose violations, take the lead, and clean things up. A company can distinguish itself from culpable employees only for purposes of mitigation, not for purposes of strategy in terms of corrective action or disclosure. Companies do have to be much less considerate than they used to be in dealing with violators because there is much more at stake than there ever was, and they cannot afford the baggage.
44	It is important to know what conduct the company engaged in and to find out what happened. Therefore, the company needs to conduct a full investigation, which empowers the company to talk to the government. The core thing to do is to reach out to the government and make contact as soon as possible. The company, through counsel, should offer to meet with the government to try to get pre-indictment discovery from the prosecutor.
45	They must be sure they have an operational and real compliance program complete with a hotline program and an internal audit program.

SECTION III	PROSECUTING ORGANIZATIONS
Question III(c)	<i>Defense Counsel</i>
(1)(b)	<b>What do you think prosecutors' considerations are in selecting cases?</b>
1	It is always a matter of deterrence. They try to select cases with the greatest deterrence value.
2	They look for some cases purely as a matter of policy (i.e., if Congress has decided that it thinks water pollution is a big problem and the prosecutors target those violations). They pick higher profile cases, but they also take into consideration the capability of counsel representing the defendants. Sometimes the government decides someone is a bad person and is motivated to go after him for everything possible, and sometimes it is just a matter of the personality of the prosecutor and what kinds of cases he or she likes.
3	A corporation should be charged if it has engaged in conduct beyond mere guilt of an individual. It seems unfair to penalize the shareholders because someone did something way off the reservation. The corporation deserves to be prosecuted if it is significantly culpable and there is repeated and condoned conduct.
4	N/A
5	They look at the pervasiveness and level of wrongdoing associated with the crime. They are also looking for a real compliance program and training effort.
6	They look at the magnitude and are always conscious of how they can better spend their money, so they prefer to go with cases that involve the Department of Justice. Politics may also come into place if there is a high-profile hearing and they need to respond to that. The political process itself may encourage one type of crime to be pursued more than another during a particular president's administration.

7	Criminal prosecutors like to prosecute something that a jury will see as a crime, an intentional bad act, and not some misunderstanding of the law or accounting rules. Prosecutors want to show that the corporation or individuals did something on purpose and that they knew what they were doing was wrong.
8	Many prosecutors want to make an example of high profile individuals. The more visible the individual or corporation, the more likely they are to be prosecuted. Visibility leads to indictment.
9	In certain districts they are so desperate to bring a case that they bring any case that comes across their desk. There may be no distinction of whether it is important enough to be brought federally or at all. To some extent they bring whatever case they think they can make. No judgment is made about whether the charges should be brought as opposed to whether they can get a conviction.
10	They look for high-profile cases that will have an impact and make the headlines.
11	They look at egregiousness of the conduct and the level within the corporation at which the conduct occurred. They also consider the dollar value involved, the likelihood of achieving some sort of notoriety, and perhaps the amount of cooperation by the corporation.
12	They look to the McNulty Memo and consider those factors and the egregiousness of the harm.
13	They are always looking for significant impact on victims and whether it is a minor or major crime. They also consider how clear the evidence of criminal conduct is, and the greater the impact on victims the more tempting it is to bring a case even without overwhelming evidence of criminal misconduct.
14	They consider the magnitude of the fraud, and the larger the target the more likely they will prosecute.
15	N/A



16	They select cases based on the recognition of the case, its importance, the publicity surrounding it, who is involved, and what corporation is involved. The bigger the fish, the bigger the eyes.
17	They use a case-by-case determination of whether prosecution is better or if the conduct can be taken care of by civil action. The Thompson/McNulty Memo lays out the factors the prosecutor should consider when deciding to bring a case. They must decide if the evidence is sufficiently clear that they firmly believe they can obtain a conviction and sustain it on appeal.
18	It is often agent-driven and depends on what appeals to the agency, which is in turn pushed to the US Attorney's office.
19	First and foremost, they consider the likelihood of winning. They also consider how it will affect their career.
20	They look to the impact on the economy. Often, the decision of whether or not to prosecute is not up to the lone prosecutor but is determined by the government's priorities and policies.
21	Often there is overreaching by prosecutors and simple business transactions get charged as a crime. The government decides what to call a crime even if it is not one.
22	N/A
23	It varies. I think they are looking for impact. Also, it can be good because it puts people on notice.
24	They generally consider the same things. They look to see whether the corporation had an understanding of what the law prescribes and its willingness to break the law anyway. They look to see if there was a failure to institute procedures that would have uncovered or stopped the activity. They also consider the pervasiveness of the activity in the corporation.

25	They are looking for cases that will make the biggest impact in terms of recovering money for the government or other victims. They also look for cases that will send a deterrent message within an industry. And if the case involves a safety issue, even if it is a smaller dollar case, they will go for it.
26	They generally look at the level of the employees involved, how pervasive the activity is in the corporation, the dollar value or impact, the public policy served, and any deterrence factor. Mainly, they consider whether the activity is replete through the upper management and what a prosecution would do to the company itself.
27	They make decisions based on headlines.
28	N/A
29	If the corporation is a public name, prosecuting anybody that brings front page coverage is very tempting. Prosecutors have always been accused of looking beyond their offices to the governor's office or the bench, and they will get that public support if they have obtained convictions. They look to the harm to the public, and the potential harm to the public, so that the prosecution may serve as a loud warning to others engaged in the same or similar practice.
30	They are presumably following the principles of federal prosecutions. Some decisions are probably being driven by where the government can make some money, particularly in the health care setting, which means the government is focusing disproportionately on some industries and not on others.
31	They select them based on the strength of the evidence, the amount and type of impact on the victims (more likely to prosecute those who injure or kill someone than if the crime is purely economic), and the clarity of violations in terms of what the rules are that were broken. They look for cases that can be easily understood in terms of the essence of what occurred—the more complex the fraud, the less likely it is to be prosecuted.

32	They look at the facts and make an assessment as to whether the criminal activity involved individuals acting for their own benefit or individuals within the context of a corporate atmosphere.
33	They take cases based on the merits of the case.
34	They certainly consider the visibility of the case, the notoriety of it, and some may have visions of enhancing their careers by picking cases that have a high profile. Other than that, merits of the facts are what govern.
35	They look at what will make the biggest impact and have the greatest deterrent effect. If the conduct is blatantly over the line or the evidence is very strong, then they will likely prosecute.
36	They look to the impact of the criminal behavior and how pervasive it is in the corporation. They also look to see whether there is a need for general deterrence. There is a focus on both specific and general deterrence. Also, the severity of the criminal behavior and the ability to provide restitution to the victims is considered.
37	N/A
38	N/A
39	They indict cases they think they can prove.
40	Most evaluate a case on whether it can get to the jury (prima facie case) and what the likelihood of success may be.
41	They consider whether they can win, sometimes public policy, and what is brought to them by whistleblowers in terms of fact.
42	The largest consideration is the dollar amount of the harm involved.
43	They want to send a message, and they want to show the victims that they are doing something.
44	Often it depends on the skill set of the prosecutor. Prosecutors today are more specialized and may be handling more complex and technical cases. There are also political considerations that factor in, because it often depends on where the government allocates resources. It depends on the priorities set by the Department of Justice and Congress.

45	<p>The number one issue in criminal prosecutions is if they can get a conviction. If they can, then they will prosecute. They all believe that the defendant is guilty, but if they cannot get a conviction, they will not bring the case. Political pressure bears a role in that—more and more the demise of Arthur Andersen demonstrated to the prosecution that there are real human tolls in prosecuting a corporation.</p>
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<b>SECTION IV</b>	<b>ORGANIZATIONS &amp; CRIMINAL ACTIVITY</b>
<b>Question IV(a)</b>	<b>What would you identify as the characteristics of organizations that encourage criminal activity?</b>
1	Corporations that inadvertently encourage criminal activity usually have a decentralized management structure and control, which permits individuals who are so inclined to engage in inappropriate conduct.
2	There can be a corporate culture that plays a major role in it. If employees see the president doing illegal things, they may be inclined to think they can do it too.
3	It is very rare to find a corporation that encourages unlawful activity. It is more common to find a corporation that would condone unlawful practices, although this is becoming rare. There are some anti-trust concerns with some multi-national companies that have strong anti-trust compliance policies and training in the US but the same rules do not apply overseas. Some companies become ensnared with criminal prosecutions in the US, based on actions of overseas employees.
4	They are often less structured and are driven by one or two strong personalities with no compliance programs. They have a weak board of directors, weak auditors, and the result is that there are no checks and balances within the organization.
5	There is a complete lack of a compliance program or one that is in name only. They do not have an active compliance program and what they do have is controlled by the person doing the fraudulent acts. Usually there is also direct involvement by management in the criminal activities and a good amount of reckless disregard of what is happening at different levels of the company.

6	Very few companies really encourage criminal activity. Most of the time it is the absence of adequate controls to catch it that encourages criminal activity. Corporations want to make money, and they may not have the proper controls to catch the actions of dishonest people. Greed and the pressure to meet the expectations of Wall Street also encourage cutting corners. There may be managers who people are afraid to challenge. Convictions are often the result of a bad business plan, negligence, even gross negligence, but not criminal conduct.
7	Not many affirmatively encourage it. It is more likely that they tacitly allow things to happen by inattention or by not taking compliance seriously. The head of compliance may not have much power at all, and may be in a back office where no one takes him or her seriously. Corporations must send a message from the top of the company that there is no tolerance for that kind of bad behavior. They must show employees that they are serious about it because if management does not respond appropriately then others get the idea that bad behavior might be ok.
8	Usually they tend to have a failure of oversight at the board level.
9	Organizations may have a single rogue employee and the whole corporation gets tagged. Even if it is trying to encourage compliance, it can still have problems if the employee is committing the crime independently.
10	I have not seen corporations that encourage criminal activity. But for those that do, it is likely that controls have not been in place and the executives have not taken steps to bring individuals in line.
11	It varies from a corporation that is bottom-line driven to a company that fails to give appropriate guidance and direction to employees.

12	They focus on the pressures in corporate America to produce favorable financial results consistently. Ramifications of this lead to potential encouragement of white collar crime. A focus on short-term gains, favorable reporting, and consistent success leads to all manner of problems.
13	Generally speaking they are not in legitimate businesses and are not making their money by delivering real service or good products.
14	They are corporations that will condone such criminal activity, overlooking flaws to maximize profits and turning a blind eye to the activity.
15	The existence of a culture that belittles the regulatory framework that the business is supposed to operate within and where there is little accountability and emphasis on compliance with business regulations are good examples of such organizations.
16	Poor compliance and ethics from the management can translate down to rank and file. If management or decision makers show poor ethics and cut corners, that permeates down into the company.
17	They do not have a strong code of ethics or do not pay attention to the one they have.
18	They are companies that are set up as a fraud in the first place. Most companies have no intention of breaking any laws.
19	Corporations who deal in areas with inherent difficulty in complying with the law run the risk of encouraging fraud. Also, if the company does not have adequate resources to comply sufficiently with the government's expectations, it is vulnerable to criminal prosecution.
20	They have lousy internal controls usually. Some types of companies are more likely to facilitate fraud, especially those that sell business opportunities. However, most companies are not set up to participate in criminal behavior, they simply do not have the internal controls in place to prevent it.

21	Large corporations encourage criminal activity by putting too much pressure on middle management to achieve unrealistic financial goals.
22	They usually do not have an effective compliance program. Often it is just a paper compliance plan. They have strong central leaders and a weak organizational culture. Capital intensive industries are more prone to fraud. Organizations with weak general counsels and weak internal accounting/auditing structures are more likely to latently encourage crime. Organizations in areas that are rapidly changing are also prone to fraud.
23	They tend to be companies that have a short-sighted financial emphasis where employees' conduct is being judged by short-term goal results. That atmosphere encourages people to take shortcuts in order to meet the numbers, for example.
24	They focus on the profits at the cost of activities that are not profit-making but would assist in ferreting out wrongdoing and punishing it. There is generally a tone set at the top that focuses on cost-cutting and profit-making.
25	Sometimes there are smaller companies founded by a certain person with good intentions, then they grow and become successful, and there is a corporate culture of cutting corners that has developed, and they get away with it. They realize if they keep doing it they will make more money, so it becomes engrained in the corporate culture.
26	It is a company whose leaders did not feel constricted by business ethics and adopt the philosophy that the ends justify the means. The dollar is their ultimate goal and they have employees that do not have ingrained in them a high sense of ethics.
27	They focus on the bottom line and the have a desire to make more money faster. Often it is a result of ruthless competition, not greed, but they have a "do anything to win" attitude.
28	They are intensely profit-oriented and really pressure the organization to meet financial targets.



29	The personalities encourage criminal activity because the organization reflects the personalities of the people within it.
30	They are organizations that do not have a strong ethical corporate culture, the tone of which is set at the top.
31	They are really focused more on getting ahead and making their numbers for shareholders, earning as much as possible, and growing as fast as possible. The real strategy is based on maximizing profit.
32	They do not openly encourage the activity, but when they make a point of emphasizing the bottom line of every transaction and every activity to promote success only on the basis of dollars without any ethical override, or any sense that good people make out fairly well, it suggests to the employees that the way to make money is to play fast and loose with the rules to make more money. Some people who are inclined to benefit personally could look at that and say that the company is asking them to make money and will not ask questions. This does not inhibit the wrongdoing traits that individuals might otherwise have.
33	They do not have strong internal audit functions and corporate compliance plans that are actually supported by management, and they do not have strong and independent board members.
34	Organizations generally do not clearly encourage white collar crime. However, there are individuals who are in positions of power who are aggressive and decide to go ahead and have their company do things that are in violation of the law.
35	They are organizations that are insular and that do not cycle independent, new people through leadership and oversight positions. They do not have outside auditors or independent boards.

36	Companies that are more prone to have employees engaged in wrongdoing tend to have the following factors: weak ethical leadership that tolerates unethical behavior, lack of auditing and monitoring, lack of a good compliance and ethics program, lack of educational programs for the workforce, weak punishment or reaction to wrongdoing, lack of a consistent message to employees regarding wrongdoing, failure to encourage employees to report wrongdoing, and lack of an anti-retaliation policy.
37	It depends who is at the top, who is setting the example, who is on the board of directors, and who is in a position of responsibility. Such organizations have powerful and intelligent people at the top, but who lack moral and ethical character.
38	It comes down to a question of leadership because the corporate ethic is established by those in uppermost management. If there are people who are angle shooters at the top, that sends the message all the way down the line. In bigger scale scams, the only way that happens is if there is someone on the management level signing on to it.
39	They have leadership that has lost its moral compass.
40	They do not exercise good management oversight. They only look at whether a profit was made and this very hands-off approach can create a problem.
41	These are organizations which are in the chewer with respect to their responsibility and best practices, that collectively act like an ostrich with their head in the sand, and who think compliance is a joke or something they should not elevate to a higher priority. They also do not understand sentencing guidelines for effective compliance programs.

42	Not many try to encourage such activity. However, smaller and mid-sized companies where financial issues are hugely significant may be more at risk. At those companies management might pay lip service to compliance but when it comes to marshalling resources to meet compliance standards, they are strapped for funds, which leads to riskier behavior.
43	These are very rare. What typically happens is that an organization finds itself floating into illegal conduct because that is the way business has been done, that is the expectation, it is easier, it is a grey area, and no one thinks they will get caught.
44	One characteristic is rapid growth of the organization. Also, a lack of internal controls, lack of strong leadership in the area of compliance, and signals being sent that the company wants economic gains at all costs are things to look for. They also tend not to worry about obligations to follow the law and have a looseness in the top of the organization. The leadership is motivated only by the short-term financial well-being of the company, not the long-term viability.
45	Corporations do not encourage criminal activity. There are policies, like "heads on beds" or bonuses based on the percentage of occupied beds in the hospital setting, that are asking for trouble and essentially encouraging fraud. Most organizations should understand what practices almost force people to violate the law.

<b>SECTION IV ORGANIZATIONS &amp; CRIMINAL ACTIVITY</b>	
<b>Question IV(b)</b>	<b>What would you identify as the characteristics of organizations that discourage criminal activity?</b>
1	Primarily, they create a culture from the top down that promotes ethical conduct coupled with a strong compliance program.
2	There can be a corporate culture that plays a major role in it.
3	A compliance program is the beginning, but it must be a real program and there must be a sincere effort to make it work. There must be a commitment to do things the right way. If the executives have a sincere attitude and commitment to compliance, then that attitude will flow down to everyone.
4	They are more structured, have compliance programs, and have a strong board and auditors.
5	They have a strong compliance effort that is real and that signals that they do not want any violations of the law. They require all employees to go through compliance training and provide an anonymous hotline for reporting. They encourage revelations of wrongdoing and fraud in the company. There is an effort by the company to set up a culture of compliance among employees at all levels. They also have strong internal audit programs with true cooperation with outside auditors.
6	They have adequate controls in place.
7	They have people who are well-compensated and are respected in the compliance department. The head of compliance is empowered.

8	They have an active board and insist on education on a regular basis for middle-management and above. They should have mandatory seminars about compliance and the intricacies of it. They need to have people with experience with prosecutions to inform them of how vicious a prosecution can be so they make sure they do not cross the line. They should also have in-house counsel and independent counsel present for any close call. They should be transparent and forthcoming and invite criticism of the decisions they make so they can see what others think of those decisions.
9	The best a corporation can do is have a culture of compliance, but that may not stop it either.
10	They conduct proper training, oversight, education, and they set the tone from the top that it will not be tolerated.
11	They tend to be corporations that have extensive ethics and compliance programs and give more than lip service to ethics and compliance. They repeatedly emphasize the significance of the ethics and compliance program at the high levels of the company, and there are ongoing training efforts. They respond to and publicize any incident of non-compliance that they identify.
12	They create a culture of compliance through strict compliance programs, ongoing compliance education, and structures in the company that emphasize compliance. They have a separate person or group that audits behavior and compliance and reports directly to a high level corporate officer.
13	They conduct legitimate business and are not motivated to encourage misconduct because the risks are too great.
14	They have active and aggressive compliance programs.
15	They encourage following the rules and fire or discipline people who do not follow the rules. They also have a corporate compliance department that reports to the CEO or someone on the board.

16	Companies are more compliant if management puts resources and manpower into compliance issues.
17	They have a good corporate culture with a detailed, explicit code of conduct. They also ensure that all employees are aware of the code of conduct they are expected to maintain and have seminars to teach employees what good conduct is expected and how to avoid conflicts.
18	They have outside review by a team of criminal defense and accounting specialists.
19	They have an effective compliance program and maximize avoidance of criminal conduct.
20	They have a strong compliance plan in place and are not in a questionable type of business. Their compliance program is active and not a meaningless code of ethics. They also do searching reviews of employees' and management's activities.
21	They should avoid a culture that the stock must always go up. It helps to have an ethics officer and a reporting structure. They need a culture that says "we reward honesty," even if it is bad news.
22	They have a strong internal compliance program and a strong auditing program. They have strong board oversight of senior executives and have an effective and visible response to fraud.
23	The companies that foster a humanistic/family tone, rather than a numbers tone, do better in preventing criminal behavior. They are ones that establish a moral and ethical environment.
24	In part, it is the tone that is set and in part, it is the training individuals are given. Corporations should avoid hypocrisy by talking and living the same thing. A rigid and sincere internal compliance program with support from senior management is also important. There should also be support for those in the organization who uncover wrongdoing and a willingness to accept news even when it is bad.
25	They have a corporate culture and policies that promote and encourage honesty, compliance, and the employees are trained in these policies.

26	They make it a practice to have an ethics policy that does not just exist on paper but is ingrained in all employees, at all levels, and provides protocols for reporting suspicious behavior. They are proactive with their ethics policy.
27	They put standards and the integrity of the process first. It starts with the board of directors and a carefully chosen management team. Corporations should look for CEOs with core values.
28	They emphasize ethics even at the expense of financial success.
29	The larger corporations do have various methods of supervision and of verification of certain practices that are built-in brakes against wrongdoing. The Sarbanes-Oxley Act also has a good element, which is the requirement of "reporting up," even though it imposes an inappropriate burden upon smaller companies. Corporations should have a structure which reviews what is going on or what has raised questions.
30	They are organizations that do have a strong ethical corporate culture, the tone of which is set at the top.
31	They are more focused on being good public citizens in their respective work. They treat their employees and the environment well, and have strong business ethics. They recognize that there has to be a balance between profit making and fair practices.
32	They have oversight and an ongoing sense of the ethics of the business, the industry, and what it means to be a citizen. The government has been enamored with corporate compliance programs, but these are not very convincing.
33	They have strong internal audit functions and corporate compliance plans that are actually supported by management, and they have strong and independent board members.
34	They usually have policies set that tell their employees what they should not do.

35	They have a wide disclosure program and a high level of independent oversight, including auditors, accountants, and lawyers. They ensure that there is ample review of corporate actions and not simply a series of yes-people.
36	They are companies that have strong ethical leadership and set an ethical tone at the top. They have strong ethical management at all levels of the company, including the department heads. They have a good compliance and ethics program and educate employees about it. They quickly react to evidence of wrongdoing and punish violators, sending a consistent message of intolerance for wrongdoing to employees. They audit and monitor consistently to make sure there is not a problem.
37	Such organizations have powerful and intelligent people at the top who have a strong moral and ethical character.
38	It comes down to a question of leadership. The corporate ethic is established by those in upper most management. If they set the right tone and treat their people right, that sets a tone for the employees to do the right thing.
39	They have strong leadership with a sense of right and wrong.
40	When there is a strong compliance ethic coming from the top, rarely does one find a corporation doing something wrong. Any kind of criminal conviction can have a dramatic impact on the corporation, so there is a very strong compliance ethic among some that creates the atmosphere of non-violation of the law.
41	They understand the importance of compliance as an integral part of their culture and activity, they allocate sufficient resources for compliance, they are effective in protecting criminal activity, and they have audits and monitors that identify risk areas to ensure that they are not engaging in that type of activity. They also understand the sentencing guidelines for effective compliance programs.



42	Putting money into compliance efforts discourages criminal activity. Companies must have someone at the top who is committed to compliance rather than have it take a back seat to the bottom line.
43	N/A
44	They have employees with the right moral and ethical compass. They have annual evaluations and a compliance plan. There is a strong enforcement policy with penalties for bad behavior, which sends a message from leadership of why compliance matters. The leader sets the tone for the company.
45	They have got to have an operational and real compliance program with an operational and real hotline program, real internal audit program, and a program that says to employees "if you find anyone violating the law, come to us first."

SECTION V	MANAGERS IN CORPORATIONS
<b>Question V(a)</b>	<b>Assuming appropriate background/training for the job, what would you look for in hiring a CEO/upper management who would encourage law abiding behaviour within the corporation?</b>
1	Look to see if they have had any prior issues in past positions. Look to see that they are guided by a sense of moral propriety.
2	Look for someone who will lay down rules, who will establish that anything other than strict compliance will not be tolerated and would be reported to appropriate authorities for official action.
3	Look for someone with a significant degree of self-confidence and a good, solid compass. Look for someone who will not hesitate to tell people not to even think about committing fraud. They need to be "rock solid."
4	Look for someone with an open mind, a willingness to hear bad news and take good advice, and who is willing to reach out in the organization and get conflicting views.
5	Look for someone who has a personal background of integrity and a good reputation for integrity. Look for someone who has some prior experience with compliance issues and understands the importance of compliance and has a willingness to commit adequate resources toward compliance.
6	Look for someone with a solid reputation and whether he or she has spoken on the subject. Also look at his or her history at former companies, etc. Yet, it goes beyond the CEO because a fertile ground for wrongdoing is created if the CEO or board of directors only cares about making money and the employees feel that if they do not match the expectation they will be fired.

7	<p>Look for someone who will send the message that employees are expected to perform at very high levels with integrity. That person must make sure that people in the company are doing what they are supposed to be doing, and when not, that there are appropriate sanctions. Taking compliance seriously, taking employees seriously, and valuing and rewarding ideas and enthusiasm is necessary. <u>Everything must be done with integrity.</u></p>
8	<p>Look for moral fiber first and for people who understand how business can work successfully without breaking the law. Look for someone who is not afraid of criticism and wants to operate in a transparent way. Look for someone who is open to new ideas and is committed to educating the workforce about federal regulations and compliance.</p>
9	<p>Look at the person's track record to see if there have been regulatory violations in his or her past. Otherwise it is just whether the person seems to have enough backbone that if management puts pressure on him to increase revenues, he will not bend. The person must have enough strength of personality to fight such suggestions off as opposed to just agreeing to them.</p>
10	<p>Look for someone with an ethical background who is a strong leader and cares about values.</p>
11	<p>Look for someone with a sense of social and moral/ethical obligation. Look for an individual who is willing to not only pursue the financial objectives of the company, but demonstrates, by example, that it has to be achieved with appropriate means.</p>
12	<p>Look at the person's background and track record, including whether he or she has faced important issues and weathered a storm. Look for a person who has been exposed to and managed a crisis in the past so that he or she is sensitized to it and prioritizes compliance.</p>

13	Look for someone who seems to be forthright and has what most people would view as the attributes of being an honest person who is willing to take responsibility. Look for someone whose overall tone and approach to business indicates that he or she is honest and does not try to cheat.
14	Look at the training the person has had in enforcing ethics, making sure that they are not just number crunchers but that they understand compliance programs.
15	Look for someone with good ethical standards.
16	Look at the person's history, where he or she has come from, and some of the mechanisms that were incorporated in prior places of employment. If the person came from a culture where compliance is important and expected, there is a good chance that he or she will have the same mentality at a new company.
17	Look for honesty, a person who recognizes that success is playing by the rules. Also look for some religious or secular humanism and a commitment not to cut corners.
18	Look for honesty, integrity, knowledge of the industry's regulations.
19	Look for someone with a track record with companies who have avoided criminal conduct.
20	Look for intelligence, integrity, and initiative. Generally, you know it when you see it.
21	Look for a CEO who can talk about his or her failures as well as successes. Look for someone who is honest, talks regular talk, and is not an overbearing or egocentric personality. Look for someone whose business plan is to conduct the business better, not someone with an imaginative accounting background.
22	Look at what organization they came from and why they left. Do a background check to ensure there are no criminal convictions, lawsuits, or suspensions. Look to see what kind of fights they have been in before and what position they took. Make sure they have a commitment to ethical standards.

23	Look for past experience in a business sense, a belief in creating a law-abiding environment. Also look for someone who is strong-willed.
24	Look for an individual that demonstrated empathy with the employees and an understanding that the employees themselves are the backbone of the company. Look for scrupulous compliance with the law and a concern about the broader impact on society as opposed to a narrow, profitmaking interest.
25	Look at the other positions the person has been in and do due diligence on how those companies did and why. If there was tremendous growth in revenue it would be important to know whether something illegal, ethical, or immoral was done to make that happen.
26	Look for someone who comes to the job with a background of demonstrated ethics and understanding of business ethics. Look for someone who is not starting from scratch and has been doing it for years, and who has a willingness and understanding of the importance of actually having ethics, not just a policy.
27	Look for core values and commitment to more than the bottom line. Look for integrity at every level and for people who feel strongly that character is paramount. Look for someone who wants to build a team, not make a lot of money.
28	Look for someone who is committed to doing things right, has an ethical approach, and who makes no exceptions that the law has to be obeyed.
29	Look for someone who knows the general principles of accounting, is knowledgeable of the body of law that regulates or applies to the business of a corporation, and who does not stand beholden personally or professionally to the management of the corporation.
30	Look for evidence in the person's background that he or she is a leader and not a follower and is someone who is balanced and secure.

31	Look for someone who has a personal code of ethics that he or she likes to apply and expects of those who work for him or her. It should be someone who has a good understanding of the pressures that middle management are under when they are given rigid profitability or growth guidelines, and when they are being judged purely on the basis of meeting the numbers.
32	Look for someone with personal ethics.
33	Look for someone who is willing and interested in putting his personal stamp of approval on the corporate compliance plan of the company, being visible, and encouraging other employees to comply. Look for someone who recognizes that appropriate resources have to be allocated to the compliance and audit divisions of the corporation, and someone who would see that there are policies and procedures instituted for what to do when an employee comes under suspicion, such as when the company will pay for the services of lawyer to represent the employee.
34	Look for someone with integrity, and who wishes to conduct the organization in a lawful manner.
35	Look to the sum of his or her career to that point and his or her track record at other companies. Look to their views on independent oversight and a commitment to full disclosure.
36	A CEO must be a great leader, and that is the most important characteristic. They have to be strong, ethical leaders who are confident enough to be open to hearing about problems in the organization that need to be addressed. They are able to inspire people that ethical conduct is the cornerstone of the corporation. They need to have a detailed knowledge of the industry that allows them to understand the areas of risk so they can keep an eye on those areas. It helps to have someone who is savvy in matters of finance and understands the importance of correctly handling the information that goes to the market.

37	In addition to the person's mind, look at the person's heart and see the sorts of activities with which the person is involved. Community service and some sort of quality that shows that they have heart would be something to look for because it would show some sort of moral compass.
38	Look for someone who has credibility, not someone who cuts corners and is lazy. People who try to make money on the cheap and do not have the skills to compete, or simply want to get more than there is to get, will cheat. Lack of skill will also lead to cheating. Look for someone who has the business acumen, skills, understanding of the industry, fortitude and inherent integrity to do it right.
39	Look for someone who has demonstrated character in the past and shown that they are not going to sacrifice the company's accounting standards for the next quarterly report. Look for someone who will reach beyond technical experience and look for character.
40	Look for someone with a sense of integrity and who understands that while the object of a corporation is to make money, it needs to be made lawfully.
41	Look for someone who has a sense of not only obligation for ensuring client activity, but someone who understands how to effectively accomplish that and what they should or should not be doing in that regard.
42	Look for someone who is honest, has good judgment and can see that the long-term benefits of a consistently compliant company outweigh the short-term gain from cutting corners.
43	Look for someone who puts compliance and proper governance above profitability, and who recognizes that the damage to a company's reputation, even where there is no prosecution, would have such severe impact on the financial bottom line that compliance has to be a top priority.

44	Their record would speak for itself. Look for a track record of competence and compliance—someone who is a hands-on leader. Look for someone who is not unwilling to delegate but makes it clear that he or she is setting high standards and does not want to be surprised. Look for good leaders who are giving the company and board complete and accurate information and are engaged with the board and the audit committee. Look for a person whose goal for the company is to be productive within the confines of the law and has zero tolerance for misconduct.
45	Look for one who has been through a criminal investigation in the past so they know how dangerous it is and how important ethics and compliance are.



<b>SECTION V</b>		<b>MANAGERS IN CORPORATIONS</b>	
<b>Question V(b)</b>	<b>Do these steps sacrifice competitive position?</b>		
1	No.		
2	Yes, depending on particular businesses.		
3	Not in the least. The entity that does not cheat is better off in the long-run by far.		
4	Sometimes they do. There have been instances of white collar crime in the pharmaceutical industry where a number of organizations break the law by performing a common practice in the industry (e.g., "off-label" promos), and the company we prosecuted did it because the officers knew others were doing that practice. Opting out of such behavior would be fine, but the disadvantage would be theirs.		
5	Not necessarily. Any impact would be modest.		
6	No.		
7	No. At the end of the day companies that are really good companies that are well run do much better than those who cheat and fudge things.		
8	I don't think so. A company that is visibly transparent will receive better treatment from analysts.		
9	No. I do not think that this is an extra criterion. It is just more important now.		
10	Possibly, because a person with that background may be less risk adverse. He or she may not want to get as close to the line as other people will.		
11	Not in the long run.		
12	They could because compliance is expensive and many companies cannot afford it.		
13	No. In today's environment companies like that are not really sacrificing much because it could be so costly if the company makes a mistake.		
14	No.		
15	No, at least it shouldn't.		

16	In the past not as much emphasis may have been placed on those issues, but in today's environment, having that infrastructure in place is crucial, and as there are issues that come up, it will have a far greater impact on the corporation than if those qualities were considered in the beginning. It is a critical component of a company's longevity to have done everything to ensure that the corporation is compliant and as fraud-free as possible.
17	If the corporation wants to last a long time, then no.
18	No.
19	No.
20	They might, but those are the general risks and rewards. If the company commits a crime and gets caught, then the fact that it did not sacrifice a competitive advantage does not really matter anymore.
21	No. In the end, an honest CEO will make the company more profitable.
22	It depends on the industry, but yes in some industries.
23	Yes.
24	Yes.
25	It depends on the industry, but in the pharmaceutical industry there is a mentality that everyone is doing it, so it is possible that if one company decided it would not do it, the executives would worry about losing marketshare.
26	Unfortunately in the real world it might, but hopefully everyone would ascribe to those virtues.
27	It can, but the focus should be on sportsmanship, not winning.
28	It may, it may not. An honest living can be made, but it means being willing to sacrifice the opportunity to make larger profits. It also requires taking a long-term approach rather than a short-term approach.

29	No. Corporations should want management to have these qualities as something that comes with the job. In today's world it is important to make sure the company is constructed in such a fashion that when a regulatory agency comes it does not see something that gives rise to questions.
30	Not necessarily.
31	Yes, they probably do to some degree. It is more difficult to compete when other corporations are not playing by the rules. They have to be more creative to come up with advantages within the rules.
32	No. Putting a premium on personal ethics does not hurt. It promotes the competitive position by making people within the organization feel like they work in a place that plays by the rules and fairly.
33	No. If every single company were to do this, it would be a cost of doing business that would be borne by everyone.
34	No. Competition should not override integrity. Looking for integrity should not diminish the integrity of the individual.
35	No. Corporations can be profitable while being more careful.
36	No, just the opposite.
37	Not at all. It enhances it.
38	They should not at all.
39	No, because the effect of getting involved in a criminal investigation is so devastating.
40	Yes, they do to some extent in the international arena but not domestically, although that is changing rapidly too.
41	No. It does not have to at all. In some sectors, organizations that engage in compliant conduct sometimes find that they are more competitive. In the long run there is a relationship between compliance and profitability.
42	In the short term they can and do, but top company executives must look long-term, and so they need to have the foresight to see that they will be better positioned in the long-run by following the law.

43	Yes. Very often a company has to decide that it is not going to do this and therefore will not compete for a particular project.
44	In the short term, it probably does, but it is the equivalent of not having insurance on a house. It can be significantly bad for the company if it has not taken all the necessary protections. The risks are huge, but the rewards are limited.
45	They can affect a company's competitive position, especially when competing with overseas companies.

<b>SECTION V</b>		<b>MANAGERS IN CORPORATIONS</b>	
<b>Question V(c)</b>	<b>Is there a way to implement these steps without sacrificing competitiveness?</b>		
1	N/A		
2	It depends on what particular policy is at issue. There may be certain activities that can be accomplished in legal ways as opposed to illegal ways, and the corporation must work at it to find the legal route.		
3	N/A		
4	Yes. Companies that are successful are innovative, and the idea that they would have to engage in fraudulent behaviors is just a fallacy. They do not need to break the law.		
5	N/A		
6	N/A		
7	N/A		
8	N/A		
9	N/A		
10	If the right culture is encouraged in the corporation, in long run the corporation will be in a better place and business will thrive, but it may be difficult in short run.		
11	N/A		
12	N/A		
13	N/A		
14	N/A		
15	If the employees feel like the people at the top care about following the rules, then they will follow the rules, too.		
16	Everyone is supposed to be doing these things and certifying compliance. The only way to do that is to be able to demonstrate that the corporation understands its obligations and is willing to support that.		
17	The corporation should look to the long-run and recognize that it is better to do the right thing.		
18	N/A		

19	N/A
20	N/A
21	N/A
22	Sometimes there is not because in some industries the successful competitive position is based on breaking the rules.
23	You could find someone who has the ethical qualities and a good business sense, but it is difficult. Most people have a limited number of qualities.
24	In environmental crimes, environmental compliance in the long-run benefits the bottom line by reducing the amount of waste.
25	Yes. One of these companies can make itself the posterchild, and if it has a good product, that would help build the case for ethical business practices.
26	N/A
27	Yes. Corporations should find people who have the right balance and character.
28	No.
29	That is not a fair consideration.
30	Yes. If corporations have a leader who is balanced and ethical, they can still be competitive.
31	The more other companies comply with the rules, the less the obedient company sacrifices. Also, the better the enforcement of the rules, the more deterrence there is so that it does not make it worth the risk to disregard the rules. The overall best way is to try to instill a broader culture like that in the industry as a whole.
32	N/A
33	N/A
34	N/A
35	N/A
36	N/A
37	N/A
38	N/A
39	N/A
40	That type of conduct is not a problem domestically.
41	N/A

42	Companies cannot control what their competitors are doing, so one company acting by itself cannot fix that.
43	Everyone says that if the business is run legitimately it will be more competitive, but the reality is that the only way to become more competitive is to not have to spend as much to clean things up all the time.
44	They should focus on the long-run and cost-benefit analysis.
45	N/A

<b>SECTION V</b>		<b>MANAGERS IN CORPORATIONS</b>	
<b>Question V(d)</b>	<b>Do salary incentives like stock options and bonuses tied to profits provide an incentive to engage in fraud?</b>		
1	Yes, they do provide an incentive.		
2	They can. If illegal actions are taken to make that stock go up, then yes, to that extent the options have served as an incentive to violate the law. This happens in overstating earnings.		
3	Only in an extraordinarily minor way.		
4	Yes, they provide huge incentives. In the corporate world this is often what causes the fraud. Meeting goals requires that the sales staff meet sales goals, which leads to sales fraud. However, a lot of companies have changed the way they provide incentives because they are catching on that they have to be careful what they incentivize.		
5	They can, but good compliance efforts can balance this.		
6	No, not in and of themselves. They are designed to get some of the most talented people who are successful because of good business sense.		
7	They can, depending on what they are linked to. If stock options are linked to a particular quarter's performance, executives might be tempted to play with the numbers. Those incentives are valuable and important but must be linked to long term goals.		
8	They can be if misused. They ought to be open to criticism. Shareholders ought to be totally informed of compensation packages and the bonus system. They can be a big motivator as long as it is transparent.		
9	They should not but they might provide an incentive. It is impossible to know what is sitting in the back of a guy's mind when he is making these decisions.		
10	They can and they certainly have. There has been a big inducement over the years as an incentive to get ahead. Greed persuades people to cross that line.		



11	They could if they are not counterbalanced with incentives to engage in appropriate conduct (not necessarily financial incentives, but could be proper training).
12	They can, but not always.
13	No. We are in a capitalist system so business is designed to make profit and money for the people in those businesses.
14	No, not necessarily, though they might.
15	No.
16	They can.
17	Definitely. Not everyone will take advantage of it but it can provide motive. If handled properly, bonuses and stock options are good.
18	Perhaps. It is a financial advantage that may tempt some but would not tempt others.
19	Sure, but they are inherent in a capitalist system.
20	Yes.
21	Yes. Corporations should change incentive programs by banning stock options because they encourage people to cut corners to make the numbers go up.
22	It can but it depends on the kind of fraud. No matter what you call the incentives, the problem is why people go along with these schemes at the middle level. Stock options can work as a motivator for people who are looking for success that is connected to achievement in the marketplace.
23	Absolutely. It is like a blueprint for fraud because it is a short-term financial outlook.
24	Yes.
25	Absolutely.
26	I do not think so. Bonuses and stock options for performance have their place if one plays according to the rules.
27	Yes.
28	Absolutely.
29	That certainly has happened.

30	Certainly the government always argues that they do, but sometimes incentives are not provided and as a consequence work does not get done that should get done. Having performance measures and rewarding performance is not an evil thing. Problems only come where there is a disproportionate focus on those things to the exclusion of other priorities.
31	Yes.
32	Yes.
33	Not necessarily, but we have enough evidence of instances where that has potentially been the case to know that they can provide such incentives to engage in fraud.
34	Yes. That goes back to one of the motivations as being money. But it is not as simplistic as that since everyone wants to be more successful, which is another incentive.
35	They can, but not necessarily. Greed does factor in, but it is not the main reason.
36	Not if they are done right. It is appropriate to reward leaders for how well their organization performs, however, they must be part of a well-drawn incentive package. Perhaps there should be a restriction on when they can be exercised, so that they are linked to the long term effects of management's decisions.
37	Yes, they do provide such incentives for the people at the top.
38	Yes, they probably do provide such incentive.
39	Yes, without a doubt.
40	No. If people are going to engage in fraud, they will do it with or without such a bonus.
41	Yes, but it is not a per se incentive.
42	Yes, they probably do provide some incentive to engage in fraud.
43	Of course. The more compensation is tied to profitability, the more management is going to want to show greater profitability. That is why compliance officers cannot be investors in the company, compensation cannot be tied to their performance, and they can never get stock options.

44	They are good to have and a lot of society is built around the notion that people are incentivized by compensation for hard work. It is difficult to move away from a model with benefits tied to profits, but they should be evaluated by the boards.
45	No, everything should be tied to profits. However, dedication to compliance and ethics should also be part of the criteria. There should be a wide variety of factors that go into bonuses.

<b>SECTION VI</b>		<b>TRENDS</b>	
<b>Question VI(a)</b>	<b>What would you identify as the key differences in state versus federal handling of cases?</b>		
1	N/A		
2	The capability of the investigating agencies is the main difference. That is why there is so little of it on the state side.		
3	There are differences in the jury trial system and the ability of the government to request a jury trial. In state court, there is a higher percentage of bench trials. State cases tend to be more run-of-the-mill street crime. While the federal government can spend six months prosecuting doctors for technical violations, the state has to prosecute violent crimes and does not have a lot of time. There is less recognition of state crime outcomes.		
4	Federal system cases are much larger, both in terms of complexity of the schemes and dollars involved, and the federal courts are more rigid in the application of the rules of procedure and process than state courts are. Going into state court is easier and less formal.		
5	There are far more white collar investigations at the federal level than at the state level.		
6	The federal system has prosecutors who are more capable, more thorough, and much less political. Very often in the states, politics plays a bigger hand in how cases are handled and brought. Also, there are more career prosecutors in the federal system whereas in states they see it as stepping stone to politics.		

7	With limited exceptions, the federal system is much better equipped because it has the resources, expertise, and time to deal with white collar crime. States do not have the ability to develop expertise in white collar crime because of a lack of resources. States have to take in everything and the federal system does not because it gets to pick and choose what cases it wants to bring. Also, federal statutes are much better vehicles of white collar crime prosecution than most state statutes.
8	There is a greater chance at picking a fair jury on the state level. The federal jury selection process needs reform.
9	State systems have much more plea bargaining, and more willingness to cut a deal. There is a lot more backdoor channel work in states.
10	N/A
11	N/A
12	None.
13	Typically in large cities the local prosecutors have their hands full with violent crime and so as a general rule they are not investigating business crimes. Also, the subject matter is different from federal prosecutors' offices. Furthermore, while there are exceptions, generally federal enforcement is better at building a fraud case involving sophisticated business fraud because it has the resources.
14	The magnitude of the case is much larger in federal courts, and violations are usually far more ranging in the federal system since they cross state lines (interstate issues).
15	There is much more time spent on the process and ensuring that it is done fairly in federal court. Additionally, there are fewer cases overall in federal court and more time can be spent on each case from start to finish.
16	There are probably more stringent rules and procedures in federal court than in state court cases.

17	State court has a much greater case load and fewer resources on any particular case. The types of crimes handled are also different because state court sees more street crime. Federal courts have enormous resources, including a plethora of agencies, fewer cases, and different types of cases.
18	The state system is more likely to have crimes of passion and crimes of violence.
19	Federal prosecutors tend to be more educated and more open to alternative methods of disposition.
20	N/A
21	Federal level crimes generally get a better investigation and a worse sentence. Sentencing guidelines cause innocent people to plead guilty in plea bargains.
22	N/A
23	N/A
24	N/A
25	The state does not have as many resources as the federal government. A lot of these bigger frauds go across state boundaries, so it is difficult for one state to try to take on those fraud cases.
26	N/A
27	The judges in the state system are much savvier on the rules of evidence, are quicker to make decisions, and are more courageous. Justice is speedier on the state level.
28	There is a huge difference in experience, and a lot depends on the assignment of the trial attorney in the federal system because some are better than others.
29	In the white collar crime area the cases are more thoroughly investigated and more carefully investigated on the federal level. Most states do not have the facilities to bring the professionals who are needed.
30	The states continue to focus on violent crime and public safety, but they have to because they are the front line in those types of issues. The federal government instead focuses to some extent on traditional white collar crime.

31	As a general matter under the False Claims Act, there is probably a lower level of sophistication in the state than in the federal system. Complex crimes on the state level are handled more often by people who do not know how to handle them.
32	The federal system is much more deliberate, more comfortable with paperwork, and much more structured. Most state prosecutors in big cities are people from large law firms who act as they did when they were in those law firms. They are inclined to be courtroom people where the written word is not as important as it is in the federal system.
33	The state system has such a dramatic number of street crimes that the number of prosecutors who can be devoted to white collar crime is fairly minimal.
34	The federal system has guidelines, even though they are not mandatory anymore. Most states do not have them so the ability of the defense attorney to secure a sentence that is more palpable is easier in the state system. In the federal system, the prosecutors have the ability to marshal a lot of experienced investigators, whereas there is not as much assistance in the state system.
35	N/A
36	There is more institutional latitude in dealing with prosecutors at the state level. By and large, white collar crimes are handled more severely at the federal level than the state level.
37	States usually have fewer guidelines in terms of what they will handle than the federal system has. Also, while there is a complimentary relationship between the state and federal systems, jurisdictionally there are key differences. For example, federal courts have exclusive jurisdiction over certain crimes.
38	State systems do very little white collar crime. They only handle basic theft on occasional white collar cases because they are just not prosecuting white collar crime. Also, the federal system can put more resources on big cases than states can.

39	The crimes are more complex on the federal level, however the volume of cases is greater on the state level.
40	Federal courts spend more time on white collar crime than states do, and states do not have the necessary resources (except NY). The federal system also spends more time on significant financial crime, and states on smaller crimes.
41	The federal system seems to have much more experience in prosecuting crime against business organizations whereas state agencies are much more individual oriented. The federal system is also more mature and sophisticated and effective than state systems.
42	The most significant is the approach to sentencing. States have guidelines that are much looser and not mandatory, and while the federal guidelines are not mandatory, it still remains to be seen whether they will become as flexible. It is far harsher to be in federal court as compared to state court.
43	State and local prosecutors are more political at every level. Also, they place greater emphasis on street crime than white collar crime because there is more pressure to get quick results. They must get to the bottom of the crime and get results, and this is more difficult with fraud where it takes more time to discover the motives and whether the intent exists.
44	The resources are greater on the federal level and the caseload is smaller. The law enforcement agents are not as sophisticated at the state level. The time to prepare is longer on the federal side and the penalties are more severe at the federal level, especially for white collar offenses.
45	N/A



SECTION VI	TRENDS
<b>Question VI(b)</b>	<b>For most white collar cases, does civil prosecution under fairly punitive statutes (ex: civil False Claims Act, civil RICO, SEC prosecution) versus criminal, make sense?</b>
1	It depends on the circumstances, however, it is not nearly as effective at deterring fraud as criminal prosecution. But with the appropriate circumstances and the appropriate company it may actually have a greater deterrent effect.
2	It is appropriate to distinguish corporations from culpable individuals in those cases where very clearly the employees were acting for the benefit of the company. Punishment should be on the corporation that benefited, and that can only be done through civil penalties.
3	Theoretically, yes, but that is not the way it works. If there is truly a criminal violation, then it ought to be treated criminally and it is. If it is truly a criminal violation, then it should be treated criminally, but not to the exclusion of the civil action. All too often the threat of a criminal prosecution is used in an extortionist way by some prosecutors.
4	In some instances this makes great sense because there are times when a criminal conviction will result in debarment of a corporation that may be very necessary to maintaining healthcare. Getting the money back may be the appropriate remedy. Furthermore, it is the shareholders who ultimately lose everything in debarment. The company should not be put out of business with criminal cases.
5	In many cases, especially where there is not criminal intent, civil remedies are an appropriate course of action and can be the only appropriate course of action. However, if there is criminal intent, then it is not necessarily better to go with civil rather than criminal or vice versa. In those situations, you typically see parallel tracks. This is true for individuals and corporations.

6	Yes, frequently the crime should not be prosecuted criminally because the wrongdoing was not evil. There should not be vicarious liability unless the evidence shows that it is truly a corrupt organization because this has consequences that go beyond the criminal law—big worldwide companies want to come to the US because the capital markets are here, but now other countries are in that same arena, and companies are going elsewhere because of our aggressive law enforcement practices against companies.
7	It depends on the facts. Some crimes are sufficiently egregious and criminal prosecution is sufficiently punitive. But it is always better not to bring criminal cases in gray areas because it is important that it be a clear crime where the person knew it was wrong but intentionally did it anyway.
8	Most of the major white collar offenses ought to be civil cases. A civil case is easier to try in a fair manner, especially with discovery procedures, and is more likely to render just results. Civil avenues ought to be pursued when it is difficult to determine what crime was committed and who did what. Civil actions are better for complex business litigations because discovery is needed to determine who did what.
9	No response.
10	It depends on what kind of crime it is, and it is tough to apply across the board. There need to be criminal sanctions because companies with lots of money are not going to be deterred by civil fines. Only criminal sanctions effectively deal with that misconduct.
11	Yes. Although, since individuals do not typically have the financial resources to pay that level of award, suing individuals on a civil basis is not going to result in a high award and may not yield the desired results. In the vast majority of cases, civil remedies are more appropriate. However, if the conduct is so knowing and harmful it might be appropriate to pursue criminal remedies.

12	There are cases that arguably do not need to be prosecuted criminally and where the government has various options, which it often under-uses. However, the government has a bias toward seeking criminal charges.
13	Yes, though it is not a substitute for criminal prosecution. Doing so puts some cost on the corporation for the misconduct that should help incentivize it to have strong compliance. It is not a good idea to have punitive civil statutes because that punishes the entity for the misconduct of individuals, which can be very costly and unfair. There should be some consequence for individuals, though sending them to prison may not be as punitive as taking back the money.
14	Yes, but only against corporations. It does not make sense against individuals because there is a limit as to what they can pay on the civil side. However, civil remedies do have a significant role as well as criminal prosecution of corporations.
15	If it is difficult to prove what happened, then the civil route is better because of the lower burden of proof.
16	Yes, it makes sense when there is a more culpable CEO or management with little to no involvement by the staff underneath those individuals. To indict a corporation can be a death knell for those corporations; they cannot often recover once indicted. But if only punitive damages are levied, they do have a chance of survival. Pre-trial diversion is used by a lot of prosecutions when they recognize that an indictment could put it out of business. However, the prosecutor may also want to send a message that he expects the corporation to be fully compliant, and they may suggest an agreement whereby they will hold in advance further consideration for an indictment. This is utilized more today to send the message, to get the monetary smack while keeping a hammer over the corporation's head to ensure it is compliant.

17	Sometimes a prosecutor will look to see if it is better handled civilly. Often it is better handled civilly rather than criminally, however, frequently the government will pursue both avenues.
18	Yes, especially when the conduct is an industry standard that may violate a regulation without any criminal intent.
19	In many cases it is better to pursue civil remedies.
20	Yes. It is particularly offensive when some cases go the civil route and others are prosecuted criminally. Criminal prosecutions are always bad.
21	FCA makes sense but RICO seldom does. Criminally prosecuting a corporation is idiotic because the corporation is not corrupt, but rather a person is.
22	It depends on the facts and circumstances. The concern with civil avenues is if less people feel a threat of criminal prosecution of individuals, it creates less of a deterrent effect. Criminal prosecutions promote awareness.
23	Not exclusively. Civil remedies are good to use against corporations and individuals, but there is still a need to use federal criminal law in this area. The civil remedies should not be used to the exclusion of criminal avenues, even with corporations.
24	It depends on the wrongdoing involved. The advantage of using criminal prosecutions is to pierce the corporate veil.
25	Those civil statutes are not punitive, so both should be used particularly as to corporations, and for individuals, it makes sense if they have the resources to pay the judgment.
26	Yes, for both corporations and individuals. This country has gone too far in criminalizing activities that at their worst are a tort of some kind.

27	Yes, because the burden of proof is lower. Almost every corporate prosecution lends itself to civil remedies unless the wrongdoing is rampant within the corporation. Due to the wide breadth of corporate criminal liability, the government can prosecute the corporation, hurting a good number of innocent people, for the bad conduct of a few individuals. Since most white collar crime is about money, the ends can be achieved civilly without turning to criminal prosecution.
28	These are not fairly punitive statutes because they can be used punitively or in a compensatory way. When used more as compensatory measures, there is a greater chance of success. But if it is used punitively as an alternative to a criminal case, the prosecutor is asking for trouble because cases with small or no damage to the government end up disastrously for the government. The relator does best when the government has suffered serious financial harm. When a court characterizes the False Claims Act as a punitive statute, the government will lose, yet when the government characterizes it as compensatory, the government will win.
29	In one sense, yes. If a person has profited from illegality and wrongdoing, that person should be compelled to disgorge that which he or she obtained. But I have problems when frequently the defendant gets whipsawed between the civil and the criminal prosecutions. As a result they take the course of action that seems the easiest, and they compromise the civil case to protect their liberty, or vice versa. This also presents problems of irate citizens pounding on the prosecutor's door because they lost a few thousand dollars, which is not necessarily appropriate.

30	Yes, but I would not call it civil prosecution but rather civil enforcement. It is better to focus on civil enforcement against corporations and criminal prosecution of individuals because when the government uses the hammer of criminal prosecution against corporations, the collateral consequences against innocent stockholders can be grave.
31	Yes, it makes sense where the crime is very complex or very prevalent, and where the key to being able to stop the fraud is to make people think that there is a good chance they will be prosecuted, which is easier in the civil context.
32	Yes, it makes sense in the healthcare and defense contractor areas. In either case the ultimate objective is to take money that is wrongfully obtained and multiply it so that this person is out of pocket more than they took. There is a punitive impact on both the corporation and individuals.
33	There are not very punitive civil laws for most of the criminal activity being prosecuted in federal courts. If there were civil laws that also had employment ramifications instead of monetary fines, maybe, or if coupling monetary and employment action was possible, it might make sense. However, it might be good policy to have more civil actions available against corporations since downstream criminal ramifications are so punitive to innocent people.
34	Yes, but it depends on the facts. Such prosecution is appropriate in cases where the evidence is not quite as strong that the defendant intended to violate the law and that the conduct was more on the reckless side than criminal side.
35	Yes, because our society tends to over-criminalize any number of things to pander to public opinion, which often leads to over-incarceration. Often these types of behavior are better dealt with through civil or regulatory avenues.

36	Yes, for a corporation that is not closely held. Criminal prosecution of a corporation results in punishment that ends up affecting people that had nothing to do with the crime. A corporation should be punished by taking away the financial fruits of the corporation. It is always better to use civil remedies unless there is some specific reason for the prosecution of the business, for instance, in order to bar them from federal programs or send a message. As for individuals, financial crimes are still offenses and some criminal punishment or sanction is appropriate in those cases.
37	Yes, absolutely because frankly the federal guidelines are very liberal in terms of white collar crime. Such criminals have to really embezzle or have a loss of millions to go to jail for a long time. There has to be a civil compliment because that is what hurts more. Taking away their money is what upsets them.
38	No. No civil case has the impact of a criminal indictment. Civil actions do not provide deterrence, though they might provide suitable remedies. It is only in Grand Jury investigations and indictments that deterrence is found.
39	No. Crimes should be prosecuted using criminal statutes. However, the civil cases compliment the criminal cases and a lot of cases are never made criminally because there are civil avenues. This applies to both individuals and corporations, although criminal cases against corporations are more problematic because of the collateral damage.
40	In almost all financial crime cases, civil prosecution has a lot of advantages for prosecution of individuals, but not for the defendant. It frees-up prison space, it allows the criminal resources to be devoted to more violent crimes, and the civil penalty can be more devastating than the criminal penalties because they can wipe out a person's entire net worth. It has a good deterrent effect because it takes what they want, which is money.

41	<p>Yes. Criminal culpability for an organization may not accomplish much more than a strong civil judgment because after all, business organizations can really only be hurt by losing money. In the health care context, they also can be excluded from Medicare and Medicaid programs. The difference is something that is driven by the facts and perception of the prosecuting authority, and often times it is not so obvious what sense it makes to hold corporations criminally accountable when a civil penalty can extract a large pound of flesh along with an agreement by the corporation to comply. For individuals, the government is much more likely to charge one with a crime as well as fine them, but since they do not usually have the resources to pay a fine, it makes them more susceptible to criminal culpability as a penalty.</p>
42	<p>They both have significant effects on the company and they have deterrent effects. The logic behind having both of them is not any loftier than that more than one separate government agency is wanting to have its piece of the action and get its credit for taking enforcement action. Criminal action drives the train and civil goes along. Civil could be settled quickly were it not for the criminal prosecution, but separate civil prosecution does not add much. It only harms the company financially.</p>



43	<p>Yes, I think civil prosecution of corporations does make more sense because it provides an alternative that has an impact in terms of making the point, but does not have as much of a destructive impact on the company. There are not as many civil prosecutions of individuals since it is easier for a prosecutor to go against the corporation because it will not go to trial, and because such prosecution of individuals has no impact—individuals cannot pay. The only thing prosecutors have against individuals is jail time or affecting their lives, so for them criminal prosecution makes more sense, whereas the only way to affect corporations is through monetary means, so civil prosecution makes more sense for them. Ultimately, civil versus criminal prosecution depends more on how a company responds than on what types of violations have occurred because the goal is to encourage companies to police themselves, to implement good practices, and to have directors really do their job. The more intelligent way to approach a company is to prosecute those upon which prosecutors can have the greatest impact and that have thumbed their nose at the system and have not tried to correct themselves.</p>
44	<p>In many white collar offenses, there may be conduct that is hard to attribute to one individual or it may not be easy to show conduct, which makes civil options better. Financial penalties are very effective, particularly where there is the possibility of a criminal indictment for the company. If lots of people were not involved and the company needs to remain viable, then the civil route may be better than criminal.</p>

45	<p>Prosecuting a corporation is stupid and is not allowed in many countries. Perhaps it would be more appropriate if we had a corporate criminal liability standard that only found liability if senior management knew and approved the conduct. Corporations should be liable civilly, but not criminally. Criminal prosecutions destroy the shareholders, bondholders, and employees and families.</p>
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SECTION VI	TRENDS
<b>Question VI(c)</b>	<b>In the years you've been prosecuting/defending white collar crimes, what trends have you seen in such prosecutions?</b>
1	The prosecution has become more aggressive and more willing to bring criminal charges against white collar defendants. It has also become exceedingly difficult to mount an effective defense in white collar cases because of the plethora of criminal violations. Due to the over-criminalization of corporate behavior, prosecutors have an unlimited list of potential violations to choose from, which makes it exceedingly difficult to defend such cases.
2	There are far more activities classified as criminal than there were in times past. It is a growing industry, so to speak. Anything Congress does not like it makes a crime instead of a civil remedy.
3	Some districts have become extraordinarily hyper-technical and complex with charging white collar offenses. The laws are now being used in imaginative and technical ways.
4	The dollars are so much more than they were previously, and the complexities of the schemes have grown. There has also been an increase in defense and disaster spending, so there is now a focus on those areas.
5	There is certainly a greater trend toward white collar cases in general. There is also a trend toward prosecuting more corporations than 20 years ago. There are still more individuals prosecuted for white collar offenses, but now there is a higher percentage of corporations involved as compared to 20 years ago.
6	More companies are being prosecuted, and more are being prosecuted based on things which in the past were handled civilly. Also, agencies now work more together.

7	<p>Before Enron there were fewer corporate prosecutions. There were only certain venues where there was an active prosecution of white collar crime in the corporate context. It was pretty random in most parts of the country. Many more districts became involved in white collar cases. The DOJ encouraged that and there were mixed results, and it became clear that these are very resource-intensive cases. The trend now is that there are not as many corporate prosecutions as in the wake of Enron, but still more than before Enron.</p>
8	<p>Unfortunately more and more prosecutions are politicized and a habit has developed of getting into the special prosecutor task force type of prosecution. Prosecutors now have already made up their mind before examining the facts. There is a tendency by any administration to show how tough they can be on crime without stopping to determine if there really is a crime.</p>
9	<p>The government has more power in the federal system and more tools so that it is tough for all but the wealthiest defendants to resist prosecution.</p>
10	<p>Today the types of cases are far different. There are more Enron-type prosecutions. Activity which was treated in the civil arena is now being criminalized, and financial fraud cases are prosecuted more often now.</p>
11	<p>The major trend has been the emphasis on giving up privilege as a condition of avoiding prosecution. The Kaplan decision has slowed things down and the current trend is being looked at again.</p>
12	<p>There has been an increase in the criminalization of regulatory conduct. The government is more willing to prosecute corporate employees and officers at all levels in an attempt at increasing deterrence. Now, people go to jail much more frequently due to sentencing guidelines.</p>

13	The long-term trend is to prosecute individuals and not corporations, and to impose all of these lesser forms of supervision on the company. In the 1980s there was a big rise in prosecution of defense contracting fraud, and then in the 1990s health care fraud was the prosecution emphasis. There is less of that today and more of an effort to go after individuals and do something less than a formal prosecution against a company, such as a deferred prosecution agreement.
14	The trend is the extent to which lower level people are prosecuted in order to flip them against higher individuals. They are more likely to be prosecuted than to receive immunity as in the past. Additionally, the sheer magnitude of the size of the indictment has grown since there are many more charges now.
15	Twenty years ago, bank fraud was a big problem. However, now it is less of a problem. The type of fraud that is prevalent changes, but cheaters are clever and will find a new, clever way of cheating until the justice system addresses it. Currently, the most unaddressed area of cheating is in the health care system because the government is the easiest person to steal from. In Medicare, there is rarely an upfront effort to ensure people are really providing services, which makes committing fraud easier.
16	There has been an increase in public corruption cases. Right now it is the #1 criminal priority of the FBI and the trend seems to be refocusing on public corruption cases.
17	There are more white collar crime prosecutions now and much more severe sentences for white collar offenders. The sentencing guidelines and elimination of parole have changed all aspects of the criminal justice system.
18	The government is prosecuting more and prosecuting over less.

19	There has been an increase in the use of criminal prosecutions of corporations. There have also been attempts to deputize company counsel to investigate on behalf of the government.
20	There is a trend toward focusing on corporations, including a rise in forfeiture or other “money making” actions by the government. The problems with health care fraud have become pervasive. Additionally, the creation of the sentencing guidelines is a problem.
21	There is greater sophistication in investigation and tremendous overreaching by government. The focus is on convincing corporations to cooperate by threatening things that may not be fair.
22	The government is much better at going after the organization than 10–15 years ago. They are better at encouraging compliance and stemming fraud than before. Due to compliance programs, there has been a significant advance in addressing the problems at their source rather than down the road, which is good for everyone. A trend in the opposite direction is the rise of the winner-take-all attitude, which makes more room for entrepreneurial players. There is also a decline in a lifetime commitment to a company and people are more willing to cheat.
23	Sentencing has really changed dramatically from 30 years ago to now. White collar offenders get much bigger sentences than they used to.
24	The most alarming trend is the use of techniques and tactics by prosecutors that were historically reserved for street crimes, which confront constitutional restrictions and other matters, like waiver of attorney client privilege. Now there is no limitation on the powers of the government to prosecute and convict in a criminal case.

25	More parallel civil and criminal prosecution together is being done in the federal system, and in certain areas like healthcare. The government position on attorney-client privilege and corporate cooperation has also changed so there is less regard for such concepts. There are also more qui tam and whistleblower cases.
26	One enormous trend has been the health care fraud prosecutions. The government has gone way too far in calling civil actions criminal. The health care coding system is beyond complex and the government has taken cases of innocent acts of miscoding and made them into health care fraud cases.
27	There are trends in what is being prosecuted at any particular moment based on politics. The Reagan administration was focused on fraud and abuse in the defense contracting arena. Clinton focused on health care fraud, and Bush is focused on accounting fraud. However, the focus is turning back to procurement fraud. At the beginning of the Bush administration there was a focus on prosecuting corporations, now there is a trend toward prosecuting individuals.
28	There are two big trends. One is that up until the mid-1990s the False Claims Act was an overwhelming defense procurement fraud law. Since then it evened out with healthcare fraud, and now it is overwhelmingly used in healthcare fraud cases. With defense spending increases, but not corresponding increase in oversight, it is harder to pursue fraud even though the government is spending unprecedented amounts of money to find it. The second trend is that with the popularization with the qui tam provisions, while the risk for defendants has not changed in the last couple of years, the risk for relators has changed. It is much more difficult to be successful now because there is competition from other relators. Those second in time lose those cases.

29	<p>Over the years white collar crime prosecutions have become more complex as the civil and financial laws have become more complex, and every scheme does hatch a response if it is a criminal scheme from law enforcement, which brings about more laws and regulations. As a result, business law prosecutions have become more pressing and more difficult to defend than they were years ago. A fraud was a fraud, and no matter what kind of label was put on the prosecution, it was a fraud. But now they are quite different.</p>
30	<p>There has been an increased emphasis by prosecutors on trying to intrude in the attorney-client relationship and work product doctrine. There have been more situations where people's constitutional rights were being violated. Certainly there has also been a greater emphasis on going after corporations against which the government can extract large settlements. More cases are being brought, and I worry that the government is using exclusion as a hammer to extort settlements.</p>
31	<p>Courts, especially appellate courts, are more lenient with white collar criminals. Whereas if it was a violent crime, courts bend over backwards to keep people in jail, in white collar crime if it is a criminal prosecution, the courts tend to bend over backwards to let people off even where it is clear they violated the law. As appellate courts let people off, prosecutors look for more straight forward cases to prosecute or those that have a huge impact. On the civil side, False Claims Acts cases involve more cases and more patterns of cases against industries so that it is not a defense to say that everyone does it since often everyone does do it.</p>



32	There are cycles of cases that are the hot cases, which changes every 3 to 4 years, and when changes have been made they really are not permanent changes. The backdated option cases are now the new trend. Most white collar crime work is reactive to what is happening in the economy. People have also become more involved with larger cases and there are more corporate prosecutions.
33	There has not been much of a change with respect to individuals versus corporations. The statistics for non-prosecution agreements with corporations do not show a huge increase in those since Enron. There is any number of districts around the US where corporations have very seldom, if ever, been targets.
34	There has been a tendency for prosecutors to be more aggressive in prosecuting corporations than they were previously.
35	There is more criminalization of behaviors today. In the past, the Department of Justice would make a deal with the corporation that included the directors and officers. Now, that is not the case. Corporations are now performing more internal investigations and turning the results over to the government, which makes the corporation do the work for the prosecution. There has also been a change in the penalties white collar defendants face. Twenty years ago, white collar offenses were presumed not to end up in long jail sentences and that is not the case now due to the sentencing guidelines.

36	<p>The Department of Justice continues to be really aggressive in handling white collar offenses. To some extent, the DOJ's approach to corporation defendants has moderated since Enron and Arthur Andersen due to the fallout from the prosecution of a large entity for the acts of a small group of people, including the impact on large numbers of innocent individuals. There is now more incentive for corporations to be cooperative with the government, and we are seeing more corporate cooperation agreements and non-prosecution agreements. There is a deferred prosecution approach as to the corporation in order to go after the individuals. There is also a trend to squeeze the corporation to get deals in order to go after the individuals. However, we are seeing a trend away from such aggressive approaches following the KPMG decision and the McNulty Memo. The government is loosening its grip on corporations and is using less aggressive approaches to cooperation.</p>
37	<p>There is definitely a trend towards more corporate high-end white collar crime. There are more complex schemes which have reached the highest levels within corporations. Previously such schemes did not involve the heads of corporations (it was usually managers) but it is unclear whether that is because it has truly spread to the top or because today there are better investigative techniques to uncover the schemes.</p>
38	<p>Identity fraud has grown dramatically, but in terms of trends, more investigations have been done in the last 15 years, and the growth in expertise of federal prosecutors is one of the reasons for that. In the last 30 years there are lots of prosecutors who have gained more confidence and expertise, so there is no question that there are more complex fraud investigations. Also, the notion of the career prosecutor was just beginning to grow in 1970s, and now there are many more people doing criminal cases. The trend really is a change in the prosecutorial team that is looking at these things.</p>

39	2002 was a watershed moment for white collar defense, since then the focus on corporate and corporate-based criminal behavior is a large trend that is rolling itself out now. There are more corporate-related crimes, like securities fraud cases, and more cases dealing with significant corporations, like the pharmaceutical marketing cases. Sizeable corporations are being prosecuted rather than smaller, individual defendants. There is also more willingness by the government in trying to make big cases against big defendants.
40	There has been an increase in the criminalization of business activities. The scope of the mail fraud and securities fraud statutes has been expanded well beyond what they traditionally were, so conduct that would not have been criminal 30 years ago is now routinely prosecuted. There has also been an increase in corporate criminal prosecutions triggered by the fact that civil sanctions are almost guaranteed once a criminal conviction has happened.
41	There is definitely a trend in health care on the federal government side to attack Medicaid fraud, and the government has taken a greater role in that enforcement so federal tactics may translate over. There are generally more prosecutions of corporations, and the impact of whistleblowers has grown.
42	There are much stiffer sentences, largely because of the guidelines and an irrational reaction to overly punitive drug sentences, which ratchets up penalties for white collar offenses. There is also a greater need for enforcement agencies to address every issue with a criminal prosecution. There was greater discretion exercised previously. Also, more prosecution of companies happens today.

43	<p>The government now does not accept joint defense agreements, and companies are required to cooperate and settle. However, the most important change is the waiver of attorney-client privilege. Fifteen years ago no prosecutor would have asked for the results of internal investigations or anything that was privileged. Also, generally speaking there are more prosecutions of corporations these days.</p>
44	<p>The pendulum swings back and forth. Today, more individuals are being prosecuted and corporations are pretty much open to the government and give the government information to avoid prosecution. Before the company and the individual stood together, now they are divided. Terrorism has had a major impact. There are limited resources at the federal level and they have been moved to anti-terrorism efforts. Now, there is a trend back toward more resources available for white collar crime as compared to the years after 9/11.</p>
45	<p>Now there is more of a willingness by the government to prosecute cases that are not as clear cut. In the past, a case had to be very clearly fraudulent to be prosecuted criminally. Then as environmental crimes came to the forefront, there was no intent standard and prosecutors have gotten to where they can push the envelope more.</p>

