

# Foreword

Mary Jo White<sup>1</sup>

As I am drafting this foreword to the fourth edition of *Internal Corporate Investigations*, I have just returned to private practice after serving as chair of the U.S. Securities and Exchange Commission (SEC) for almost four years. There, I presided over record numbers of enforcement cases, enhanced use of data to detect and investigate potential wrongdoing, and took a generally more aggressive approach to charging responsible individuals as well as companies. Other regulators and prosecutors—federal, state, and international—are engaging in similar efforts.

It is not an understatement to say that the post-financial crisis world of white-collar enforcement has been transformed in the past eight years, a trend I expect to largely continue at the SEC, U.S. Department of Justice, and elsewhere. This new normal for enforcement, coupled with the increasing expectations by shareholders, Congress, and the public for good corporate behavior and strong governance, makes the knowledge and wisdom reflected in this invaluable guide to internal investigations, edited by Brad D. Brian, Barry F. McNeil, and Lisa J. Demsky, more compelling than ever for practitioners to have and master.

The use of internal investigations as a means for companies to deal with potential misconduct has become an essential tenet of corporate best practices in the past 20 years. Today, it is accepted and expected that a company will conduct an investigation when it detects potential violations of law or other misconduct in order to understand the scope of the problem and remediate it. Any responsible corporation understands that it must learn the facts quickly and comprehensively

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1. Mary Jo White is a litigation partner in the New York office of Debevoise and senior chair of the firm. Ms. White's practice focuses on counseling boards of directors and representing clients on significant and sensitive matters, including companies facing crises involving multifaceted government investigations and cases. Ms. White has decades of experience prosecuting and defending a wide range of white-collar criminal and civil cases, having served as chair of the U.S. Securities and Exchange Commission, as the U.S. attorney for the Southern District of New York, and as a well-known private practitioner in high-profile matters.

and rapidly ensure that the culpable participants are disciplined, the breakdowns in controls are fixed, and the proper public disclosures are made.

Internal investigations are important for another reason, which is apparent to me from my time in private practice and the government. The broad standard for corporate criminal liability—a company is liable for the criminal acts of any employee as long as he or she acted in some way for the corporation’s benefit—and a similar standard for regulatory liability mean that companies are reliant on the government’s discretion in making charging decisions in an environment that emphasizes strong enforcement. Once misconduct has occurred, there are only two things that a company can do to mitigate its position with the government: remediate and cooperate. This is even more true with the advent of the SEC’s whistleblower program, which financially incentivizes company employees and others to share evidence of violations of law with the SEC.

If companies do not share information quickly with the government, they increasingly face the risk that others will do so. That means that conducting an investigation, and doing so both rapidly and with care, is indispensable to gathering the facts so that they may be shared, in appropriate cases, with the government—maximizing the credit given to the corporation for cooperation. It is only through a credible internal investigation that a company can ensure that the government will credit its cooperation and effectively address the range of other constituents who will demand answers and actions that promptly and effectively respond to the problems uncovered.

It is against this backdrop that the importance and centrality of *Internal Corporate Investigations* is clear. The book’s comprehensive discussion of each phase of conducting internal investigations makes it a must-read for anyone involved with internal investigations. This is the guidebook that companies and their counsel need to carry with them in the trenches to address the difficult issues that arise in every internal investigation and to successfully navigate regulators’ new and bolder approaches to enforcement.

Brad D. Brian, Barry F. McNeil, and Lisa J. Demsky have gathered together a highly experienced group of authors, and the book’s chapters marshal years’ worth of lessons learned by these authors both while representing companies in private practice and while investigating companies on behalf of the government. I have worked side by side with many of the authors and personally know that their collective decades’ worth of experience, subject matter expertise, and sound

judgment make them uniquely fit to help companies tackle internal investigations of any subject.

This book provides a blueprint for internal investigations. Some of its early chapters focus on the initial stages of an internal investigation, including the determination of the appropriateness of doing an investigation. It then moves to witness interviews, document processing, and finally disclosure of conduct to regulators or third parties. Other chapters deal with the thicket of particularly thorny issues present in many internal investigations, including the application of the attorney-client privilege and how best to respond to suspected perjury or obstruction of justice. And still other chapters address those issues that often recur when the criminal authorities are involved or derivative proceedings are brought, such as parallel civil and criminal proceedings and the role of the special litigation committee. The authors address issues common to all investigations, as well as provide guidance on circumstances unique to a number of particularly complex areas of the law, such as health care, antitrust, securities, and environmental.

The book is, in short, an essential resource. Its experts fundamentally understand that a well-conducted internal investigation is the starting point for any effective corporate problem-solving and any successful interaction with a regulator in the white-collar enforcement space. It clearly and comprehensively translates that understanding into practical guidance on whether and how to optimally conduct an appropriately scoped internal investigation.

I recommend that any lawyer engaging in an internal investigation keep a copy of this new edition of *Internal Corporate Investigations* nearby. Its pages should be well worn by the end of the investigation and, if its lessons are followed, the company will have conducted a thorough, complete, and well-executed investigation.