# WHITE COLLAR CRIME & INVESTIGATIONS LAW UPDATE

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- Anti-kickback allegations
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- Securities and other financial frauds
- Insider trading
- U.S. Customs violations
- False Claims Act (FCA)
- Foreign Corrupt Practices Act (FCPA)

For additional information on this or any white collar criminal law related issue, please contact RMF's White Collar Crime & Investigations co-chairs: Alexander G. Bateman, who can be reached at 516-663-6589 or abateman@rmfpc.com or Gregory J.

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## NYC BAR ADVOCATES LOOSENING OF FCPA RESTRICTIONS

### by Douglas M. Nadjari, Esq.

By now, most corporate officers know that the Foreign Corrupt Practices Act ("FCPA") was enacted for the purpose of discouraging bribery of foreign public officials. Indeed, the FCPA governs the actions of American corporations and those foreign corporations that have equity securities listed on any U.S. exchange. Given increased competition from foreign economies over the last fifteen years, the New York City Bar Association has recently taken the position that the statute places an undue burden on American entities that must try to comply while simultaneously fending off foreign competitors that are not subject to the FCPA's restrictions. Despite the enactment of similar legislation in other countries (and recent stepped-up enforcement elsewhere), the Association found that the statute fosters both a grossly competitive imbalance and an atmosphere that makes compliance so costly that some smaller businesses have (or are considering) withdrawing from foreign markets altogether.

For the time being, FCPA is here to stay. Indeed, earlier this year, Johnson & Johnson entered into a Deferred Prosecution Agreement for bribing publicly employed health care providers in Greece, Poland and Romania who, in turn, paid kickbacks to the Iraqi government under the United Nations Oil for Food Program. The corporation agreed to pay a significant fine and the agreement requires company officials to cooperate with DOJ investigations against other entities and their officers. Government regulators continue to look the existence of an FCPA compliance program as a significant factor to be considered whendeciding whether to close an investigation, bring civil or criminal charges. Likewise, the federal sentencing guidelines provide for the imposition of lower fines upon entities that have effective compliance programs in place.

## THE PARK DOCTRINE: PROSECUTORS & THE COURTS TARGET CORPORATE OFFICERS

In United States v. Park, the Supreme Court upheld the misdemeanor conviction of a "responsible corporate official", absent knowledge, intent (or even criminal negligence) based on his or her position of responsibility and authority to prevent and correct violations alone. The decision was profound because it

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potentially vanquished the requirement that one must generally have knowledge or intent to commit a crime before he or she may be forced to wear the "scarlet letter" of a criminal conviction. The conviction, rather, was based upon whether Park had the authority to detect, correct or prevent the violations. While the decision was indeed premised upon a discrete violation of the Food Drug and Cosmetic Act ("FDCA"), the Court did not limit its rationale to the Act itself and the application of the Park Doctrine -- creating " strict liability" offenses in other corporate endeavors—remains a clear and present danger.

While the doctrine lay largely dormant since the 1970's, it was resurrected earlier this year when four officers of Synthes, Inc., a pharmaceutical company that manufactured a bone cement product, were sentenced to prison for approving "rogue clinical trials" during which three geriatric patients died as a result of the "off-label" use of the product. Relying upon the Park Doctrine, the court found that the FDCA imposed both an affirmative duty to detect violations, correct them and implement measures that minimize the risk of future similar violations. Such responsibilities are common to other areas of the healthcare sector, government contracting, securities and myriad other industries. Robust compliance plans administered by capable compliance officers are a must and may go a long way toward avoiding the "Park-walk" that no corporate officer should ever have to take.