Government enforcement activity is heating up. Employers contend with complex regulations and face increased scrutiny with the threat of criminal and civil proceedings from immigration law and worksite enforcement, health care fraud investigations, and taxation issues. Whistleblower and qui tam actions are netting large rewards.

Drawing on experience as former federal and state prosecutors and enforcement attorneys from the Department of Justice, Department of Homeland Security and other government agencies, the Jackson Lewis White Collar & Government Enforcement attorneys are prepared to assist clients with these and other types of government proceedings:

- antitrust matters;
- fraud charges (finance, government contracts, mail and wire);
- professional license and disciplinary proceedings;
- securities violations and financial crime investigations, money laundering, embezzlement, racketeering, bribery and kickback claims;
- environmental enforcement;
- and other alleged violations of federal and state law.

**Paul V. Kelly** (Boston) heads the White Collar & Government Enforcement practice. As an Assistant U.S. Attorney, Mr. Kelly prosecuted a wide array of federal criminal violations, including racketeering, fraud, corruption, money laundering and murder. **Larry Shulman** (Detroit) served for seven years in the Wayne County Prosecutor’s Office in Detroit, where he was a member of the elite Special Crimes Section, which prosecuted a variety of high profile and highly complex criminal offenses, including criminal organizations, economic crimes and public corruption. Former Assistant U.S. Attorney **James M. Lord** (Denver) was Chief of the Organized Crime Strike Force, Coordinator of the Corporate Fraud Task Force, a Member of the Financial Investigations Review Team, an Asset Forfeiture & Money Laundering attorney, and a Computer Hacking and Intellectual Property attorney for the Western District of Washington.

**Q** What are some of the most common government enforcement issues your clients have dealt with in the past several years?

**A** Immigration enforcement has been a priority for the Obama Administration, and we regularly defend companies across a broad array of industries in enforcement actions, ranging from I-9 audits and Notices of Inspection to criminal investigations and worksite raids. Collaborating with the Firm’s Immigration practice, we respond to clients’ immediate and long-range needs and seek to provide total solutions.

For example, we recently worked with a business that had just learned of a raid being conducted by federal agents at one of its locations. We immediately opened a dialogue with the agents, and, in conjunction with the Firm’s immigration attorneys, conducted a thorough assessment of the business’s
Anti-corruption enforcement remains an area of intense governmental interest with high stakes for targeted employers.

We recommended centralizing and streamlining the company’s processes and quickly providing training to local and national management on best practices for verification and recordkeeping. Apprising the government of the company’s swift response and efforts to ensure compliance nationwide helped to persuade the government to close the matter without criminal charges or civil penalties. As an added benefit, the company, which recently had undertaken a significant geographic expansion, now had a well-organized, company-wide system in place for helping to ensure future compliance.

Anti-corruption enforcement – both domestic and international – remains an issue of intense governmental interest with high stakes. Domestically, the Department of Justice has increased scrutiny of relationships between public officials and companies with government contracts. To minimize risk, we have advised companies on avoiding conflicts of interest and establishing compliance systems to prevent even the appearance of impropriety.

Internationally, mandates under the Foreign Corrupt Practices Act, which prohibits payments to foreign government officials to obtain or retain business, continue to be top priorities. FCPA enforcement in industries as diverse as infrastructure, manufacturing, finance, pharmaceuticals and health care, and entertainment has increased over the past several years. With the Firm’s network of practitioners across all industry sectors, we have been able to help companies focus their resources on FCPA compliance, training, investigations and defense.

Health care organizations, in particular, have been subjected to greater government scrutiny, as enforcement agencies have received larger appropriations for fraud and abuse investigations. Enforcement activity has increased since the passage of the 2010 Affordable Care Act. Our attorneys are defending clients and professionals in a number of state and federal health care fraud investigations.

Government scrutiny has intensified as well for federal and state contractors that are subject to false claims prosecutions and civil suits. Our attorneys have represented companies during investigations of alleged fraud in connection with defense contracts and major public works projects where debarment and prosecution of company officials were at stake.

Q  What trends in white collar and government enforcement have been the most troublesome for employers generally in the past several years?

A  The government’s increased reliance on whistleblower bounty programs has presented extraordinary challenges. Employers take compliance seriously. They encourage internal reporting of misconduct, but the promise of large financial awards has provided employees with a significant incentive to report any alleged misconduct to outsiders.

Once a whistleblower claim is reported to a government agency, the employer must quickly investigate the allegations, evaluate whether there has been misconduct, scrutinize any lapses in internal compliance systems, and formulate a strategy to respond to the government inquiry. Depending on the scope of the allegations, substantial resources – both human and financial – may need to be devoted to investigate and address the complaint. Moreover, any

**Health Care Providers Feeling the HEAT**

For health care providers and government contractors, the stakes have never been higher. Health care fraud prosecutions under the government’s HEAT program netted a record $4.2 billion in FY 2012, and in the last year, the government excluded a record number of providers from participating in federally funded health care programs. Moreover, in 2011 and 2012, the federal government obtained more than $7 billion in settlements and judgments under the False Claims Act, which imposes liability on persons and companies that defraud governmental programs.
public disclosure of the allegations may have detrimental effects on the company. Steps to deal with publicity should be planned.

At the same time, employers are facing increasing risk when disciplining whistleblowers, as may be seen from the rapid rise of retaliation claims filed with government agencies. In addition to recent Supreme Court decisions broadly interpreting the scope of retaliation, federal agencies have closely scrutinized employment decisions for retaliation. The SEC, for example, has indicated it is actively seeking retaliation cases to litigate in federal court pursuant to the rules its Dodd-Frank Act whistleblower rules.

Another emerging trend is the involvement of federal and state prosecutors and investigators early in enforcement matters that previously were handled almost exclusively on an administrative basis. Employers targeted in such cases must navigate early on strategic hazards, such as assertions of privilege and balancing potentially conflicting criminal and civil litigation defense strategies.

A new area of concern involves the emergence of companies handling money transmitting or digital currencies. Regulators in numerous states, as well as the Fraud Section of the Department of Justice, have been drawn to these activities. Employers should be prepared for continued government scrutiny.

Q How have attorneys in your practice area handled the big issues in the workplace setting and how would you evaluate the outcomes from the client’s perspective?

A Undoubtedly, the best way to approach many of the big issues in white collar and government enforcement is to prevent problems from arising in the first place. Given the potential for liability, the robust enforcement and the disruption that investigations may create, compliance efforts are crucial for productive operations.

When an issue arises, our attorneys often work with outside forensic experts and former law enforcement officials to conduct internal investigations. While helping companies defend themselves, steps can be taken to ensure that compliance systems and employee training regimens prevent future misconduct. These steps often expose vulnerabilities that can be remediated before they become problems.

Q What particular challenges in white collar and government enforcement do you foresee for employers in the coming year or two?

A Employers will see still more vigorous law enforcement. For instance, the government has increased its use of aggressive investigative methods, including wiretaps, undercover stings, and search warrants, instead of grand jury subpoenas. These methods typically had not been used in white-collar matters. Employers that never before considered the possibility of a government investigation or raid are adopting procedures and policies to respond to these investigative techniques.

Another challenge comes from the perception of some members of Congress and the public that companies consider even large penalties as merely “the cost of doing business.” The Department of Justice has brought more cases against individual executives to encourage compliance and punish wrongdoing.

Compliance Strategies Must Keep Pace with Enforcement Methods

As the risk of complex litigation intensifies, employers can no longer afford to wait until the agents are at the door. The federal government has increased its reliance on large sets of data in developing targets to investigate and in establishing probable cause for further enforcement activity. Data mining of electronic billing information by the U.S. Department of Health and Human Services to uncover possible health care fraud and the Security and Exchange Commission’s use of the “Aberrational Performance Inquiry” to identify instances of illegal insider trading are but two examples. Employers need a sound and established strategy to address these enforcement methodologies.
Retaining defense counsel as soon as an employer learns of an investigation is essential for early and accurate assessment of criminal and civil exposure.

The DOJ’s prosecution of corporations and their executives may be accompanied by civil litigation, agency proceedings and, for employers that contract with the government, False Claims Act cases. With increasing frequency and potentially devastating impact, the government will seek debarment or exclusion of corporations and executives from participation in government programs.

Multiple actions like these raise complex issues involving the attorney-client privilege, the effect of Fifth Amendment assertions of privilege, and others which require skillful evaluation. Even where the government decides not to prosecute or seek debarment, settlement or plea agreements may impose certification requirements for board members or executives. These make liability easier to establish in the event of a future violation.

Notably, some government agencies have changed their approach to charging certain offenses, lessening their evidentiary burden. For instance, federal prosecutors are bringing more health care fraud prosecutions under the mail and wire fraud statutes, rather than the health care fraud statutes. The latter have the more onerous requirement of proving specific criminal intent. The government also has proceeded against executives on a strict liability theory in certain cases, eliminating the need to show intentional action or knowledge of misconduct.

**Q** Are there any legal reform measures – current or pending – that you see affecting employers or business executives in this area positively or negatively?

**A** On the positive side, the federal government has taken steps to clarify some enforcement priorities and to encourage compliance and self-reporting of violations. At the end of 2012, the DOJ and SEC published their Guidance on the Foreign Corrupt Practices Act, providing insight on how the government evaluated activities under the statute and providing explanations for prior enforcement actions and reasons for declining to act.

While the Guidance is not comprehensive and leaves many issues unresolved, it can help organizations strengthen compliance systems and may be useful for negotiating with the government when they have been proactive in preventing and detecting misconduct.

On the negative side, efforts to increase the criminal penalties and sentences for fraud have continued. While the prevention of fraud should be a priority for prosecutors, large penalties often create a disincentive to try defensible cases because the risk is too great. Additionally, the government’s ability to extract record settlements has raised the bar in negotiating resolutions of other matters.

The lesson for business is to remain vigilant, renew compliance efforts, and seek competent legal counsel’s assistance to help develop preventive practices and assess vulnerability to white collar criminal liability. Retaining experienced defense counsel as soon as an employer learns of an investigation with criminal law implications is essential to obtain an early, accurate assessment of potential exposure. Counsel also can best help explain the client’s compliance efforts to the government before positions become fixed.