

**Where You Least Expect It:  
Overlooked Areas Where Companies  
Face Potential Criminal Liability**

**SPEAKERS:**  
**Christopher A. Wray**  
**Andrew C. Hruska**

Tuesday, January 17, 2006  
12:30 – 1:30 p.m. Eastern time

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## Speaker Biographies



**Christopher A. Wray**

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**Christopher Wray** is a litigation partner in the firm's Washington, D.C. and Atlanta offices. Mr. Wray chairs the King & Spalding Special Matters and Government Investigations Practice Group, which provides counsel on a variety of corporate, securities and fraud matters, including white-collar criminal and regulatory enforcement matters, whistleblower complaints, and corporate internal investigations.

Prior to joining the firm, Mr. Wray served from 2003 to 2005 as the 33rd Assistant Attorney General in charge of the U.S. Department of Justice's (DOJ) Criminal Division, having been nominated by President George W. Bush and confirmed by the U.S. Senate for that position. Mr. Wray helped lead the Department's efforts to address the wave of corporate fraud scandals and restore integrity to U.S. financial markets. He served on the President's Corporate Fraud Task Force and oversaw the Enron Task Force and other major fraud investigations, both around the country and internationally.

As the Criminal Division's head, Mr. Wray led investigations, prosecutions, and policy development in nearly all areas of federal criminal law, including securities fraud, healthcare fraud, Foreign Corrupt Practices Act and export violations, bank secrecy and money laundering offenses, public corruption, intellectual property piracy and cybercrime, and racketeering. Mr. Wray was also integral to the DOJ's response to the 9/11 attacks and played a key role in the oversight of the legal and operational actions in the continuing war on terrorism. At the conclusion of his tenure in 2005, Mr. Wray received one of the Department's highest honors, the Edmund J. Randolph Award.

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## Speaker Biographies

Mr. Wray first joined the DOJ as Associate Deputy Attorney General in May 2001 and was soon appointed Principal Associate Deputy Attorney General by Attorney General John Ashcroft, in September of the same year.

Before joining the Administration, Mr. Wray served from 1997 to 2001 as an Assistant U.S. Attorney for the Northern District of Georgia. As a prosecutor in Atlanta, he handled a wide variety of federal jury trials, grand jury investigations and appeals.

Prior to his tenure in the U.S. Attorney's Office, Mr. Wray was an attorney in King & Spalding's Atlanta office, where he focused on white collar crime, complex civil litigation and internal corporate investigations.

Mr. Wray also has substantial federal appellate experience, including successful oral arguments before the U.S. Court of Appeals for Eleventh Circuit sitting *en banc* and before the U.S. Supreme Court.

He also served as a law clerk to Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit from 1992 to 1993.

Mr. Wray graduated, *cum laude*, from Yale University in 1989 and received his law degree in 1992 from Yale Law School, where he served as Executive Editor of the *Yale Law Journal*.

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## Speaker Biographies



**Andrew C. Hruska**

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**Andrew C. Hruska** is a litigation partner in King & Spalding's New York office and a member of the firm's Special Matters and Government Investigations Practice Group.

Mr. Hruska served most recently as the Chief Assistant U.S. Attorney for the Eastern District of New York, overseeing both the criminal and civil divisions. In that capacity he supervised the office's significant corporate fraud offensive, including the investigations of Computer Associates and Symbol Technologies. Mr. Hruska was appointed Acting United States Attorney for the prosecution of the New York Racing Association on tax conspiracy charges. Mr. Hruska personally led the criminal investigation of the fatal Staten Island Ferry crash of October 15, 2003 that resulted in the manslaughter conviction of New York City's Ferry Service Director.

Previously, Mr. Hruska served as the Senior Counsel to United States Deputy Attorney General Larry Thompson where he coordinated corporate fraud enforcement and policy, including the revision of the Justice Department's guidelines for corporate prosecution known as the "Thompson Memorandum," the creation of the President's Corporate Fraud Task Force initiative that harnessed the resources of the Justice Department and a range of regulatory agencies, and advice to Justice Department leadership and the Administration on the criminal provisions of the Sarbanes-Oxley Act. Mr. Hruska also coordinated the President's Project Safe Neighborhoods nation wide anti-gun-violence program and received the Project Safe Neighborhoods Achievement Award from the Attorney General.

Prior to his federal service, Mr. Hruska served as an Assistant District Attorney in the Manhattan District Attorney's Office's Frauds Bureau prosecuting major securities fraud, bank fraud and insurance fraud cases. Mr. Hruska served as a judicial clerk for the Honorable Ralph Winter of the U.S. Court of Appeals for the Second Circuit.

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## Speaker Biographies

Mr. Hruska has tried criminal and civil cases in both federal and New York State courts. His trials that received significant public attention include *United States v. Mui* (E.D.N.Y. 2004) (complex tax fraud by an accountant), *People v. Keyes* (N.Y. Supreme Ct. 2000) (widespread insurance fraud targeting United Nations missions), *People v. Wolf* (N.Y. Supreme Ct. 1999) (bribery of insurance company insiders by plaintiffs' attorney) and *Bauchman v. West High School* (D. Utah 1996) (religious liberty). He has argued in the Second and Tenth U.S. Circuit Courts of Appeals and the New York State Appellate Division, First Department.

Mr. Hruska graduated *cum laude* from Yale University and received his law degree from Yale Law School. He is a member of the bar of the State of New York, the Southern and Eastern Districts of New York, the Second, Tenth and D.C. U.S. Circuit Courts of Appeals and the United States Supreme Court. Mr. Hruska is a frequent lecturer on white-collar criminal law and other law enforcement topics.

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## **Aiding & Abetting Liability**

### **➤ 18 U.S.C. § 2. Principals**

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal

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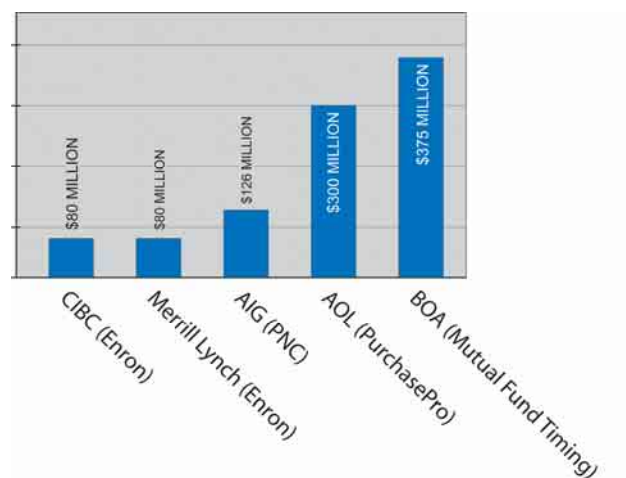
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## Aiding & Abetting Liability *(cont'd.)*

- **18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States**
  - If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
- **18 U.S.C. § 1349: Punishes security fraud conspiracies at the same level as the substantive offense**

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## Recent Significant Aiding & Abetting Liability Settlement Amounts



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## **Aiding & Abetting Securities Fraud**

### **– AIG –**

- **Transaction with PNC takes losing assets off of PNC's balance sheet without transferring risk, allowing PNC to avoid charges to its reported earnings**
- **In a non-prosecution agreement with DOJ and a settlement with SEC, AIG pays \$126 million**
  - Fine: \$80 million
  - Disgorgement/interest: \$46 million

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## **Aiding & Abetting Securities Fraud**

### **– Time Warner –**

- **“Round trip” transactions allow PurchasePro to buy advertising on AOL with phantom products and services**
- **PurchasePro improperly recognized revenue on the round-trip transaction and reported materially misstated financial results, falsely confirmed by AOL, to their own investors**
  - Deferred prosecution,
  - \$300 million in fines

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## **Aiding & Abetting Securities Fraud – Merrill Lynch –**

- **Merrill Lynch “parks” Enron’s losing assets on its own books**
- **Merrill Lynch receives promised 22 percent profit in six months**
  - Oral agreement to repay not disclosed in the written contract
- **Non-prosecution agreement providing continuing monitoring**
- **\$80 million in disgorgement, penalties and interest**

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## **Aiding & Abetting Securities Fraud – CIBC –**

- **CIBC and three of its executives aided and abetted Enron’s manipulation of its reported financial results through a series of “disguised loans” designed to inflate revenues**
- **CIBC settled for \$80 million**
  - \$37.5 million disgorgement,
  - \$37.5 million civil penalty
  - \$5 million prejudgment interest

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## Aiding & Abetting – HIPAA Violations

- **Health Insurance Portability and Accountability Act (HIPAA) [42 USC § 1320d-6] criminalizes the knowing...:**
  - (1) Use of a “unique health identifier,”
  - (2) Obtaining of “individually identifiable health information,” or
  - (3) Disclosure of “individually identifiable health information” to another person

**...in violation of any of its provisions**

- **Those provisions generally require stringent privacy of medical information**

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## Aiding & Abetting – HIPAA Violations Justice Department Memorandum of June 1, 2005

- **HIPAA criminal violations apply directly only to “covered entities”**
  - Health plans
  - Healthcare providers
  - Healthcare “clearing houses”
- **But, others may be liable as aiders and abettors under 18 USC § 2**

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## **Aiding & Abetting – Tax Fraud Conspiracy**

### **– New York Racing Association –**

- NYRA employees evaded federal income taxes for purportedly unreimbursed employee expenses
- Employees would routinely report false “shorts” repaid by employees then claimed as unreimbursed expenses
- Over 20 years, NYRA certified about \$19 million in “shorts”
- NYRA was aware of the tax fraud scheme, allowed it to continue, and concealed it from regulators
- Deferred prosecution and \$3 million fine

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## **Obstructive Conduct**

- **“Solo Shredder” Law – 18 U.S.C. § 1519**
  - Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

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## Obstructive Conduct *(cont'd.)*

### ➤ Witness Tampering/Obstruction – 18 U.S.C. § 1512 (c), (f)

- (c) Whoever corruptly:
  - » 1) Alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
  - » 2) Otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both
- (f) For the purposes of this section:
  - » 1) An official proceeding need not be pending or about to be instituted at the time of the offense; and

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## Obstructive Conduct *(cont'd.)*

### ➤ Cases:

- [United States v. Arthur Andersen LLP](#)
- [United States v. Quattrone](#)
- [United States v. Computer Associates](#)
- [United States v. Reliant Energy](#)

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## “Inherited” Criminal Liability

- Acquisition of a company engaged in a price-fixing conspiracy
  - Uniroyal/Crompton
  
- Acquisition of a company derailed by discovery of FCPA violations
  - Lockheed/Titan

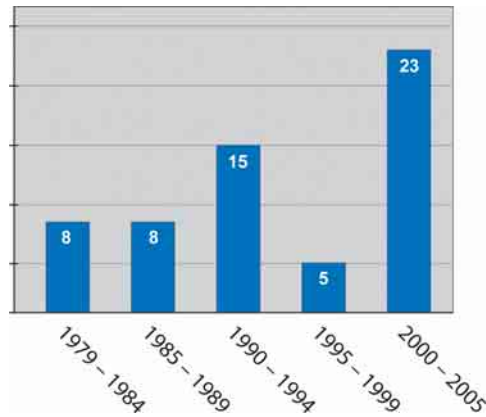
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## Foreign Corrupt Practices Act

- Anti-Bribery Provisions
  - Prohibit giving *anything of value* to a foreign or international official, with *corrupt intent*, for the purpose of *obtaining or retaining business* or *gaining an improper advantage*
  
- Books and Records Provision
  - Requires the making and keeping of books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer, as well as the devising and maintaining of a system of internal accounting controls

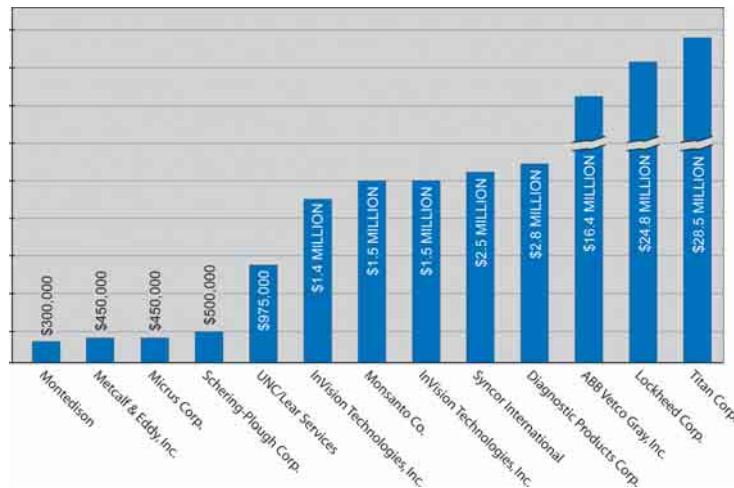
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## Foreign Bribery Criminal Prosecutions Under the FCPA 1979 – 2005



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## Significant FCPA Violation Penalties 1996 – 2005



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## **Business Courtesies**

### ***United States v. Metcalf & Eddy***

- **Firm seeking business with Egyptian sewerage authority**
  - Paid for two business trips to U.S. (including family)
  - Cash payments for expenses not accurately recorded
  - \$400,000 fine plus \$50,000 cost of investigation

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## **FCPA**

### **State-Owned Businesses**

- **Syncor International (2002)**
  - Taiwanese subsidiary made more than \$450,000 in improper payments to doctors at government-owned hospitals over a six-year period
  - \$2 million criminal fine and \$500,000 civil penalty
- **Diagnostic Products Corp. (2005)**
  - Chinese subsidiary made \$1.6 million in commission payments (usually three to five percent) to government-owned hospitals in China for sale of medical equipment over an 11-year period
  - Payments improperly recorded as sales expenses
  - Disgorgement of \$2.8 million in profits and interest

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## **FCPA** *(cont'd.)* **State-Owned Businesses**

### ➤ **Immucor Inc. (2005)**

- SEC has issued formal order of investigation concerning payments to Italian government-owned hospitals

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## **Bank Secrecy Act (BSA)**

### ➤ **Every bank must file a report of any suspicious transaction relevant to a possible violation of law or regulation following the discovery of:**

- Insider abuse involving any amount;
- Violations of federal law aggregating \$5,000 or more when a suspect can be identified;
- Violations of federal law aggregating \$25,000 or more regardless of potential suspects; or
- Transactions aggregating \$5,000 or more that involve potential money laundering or violations of the BSA if the bank knows, suspects, or has reason to suspect such violations have or will occur

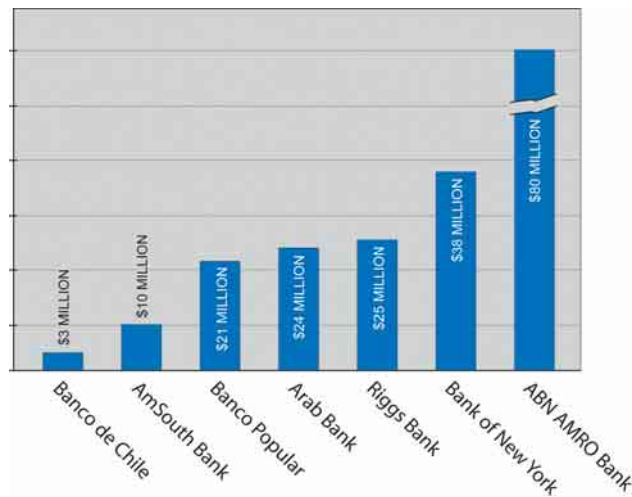
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## Expansion of BSA Scope

- **Commercial banks**
- **Many other financial services companies**
  - Investment banks
  - Money transfer companies
- **2005 Regulation [31 CFR § 103.16] applies SAR filing requirements to insurance companies**

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## Significant BSA Violation Fines 2004 – 2005



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## BSA Problem Areas

- SARs aimed at “transactions [that] appear to lack commercial justification or that otherwise cannot be explained as constituting a legitimate use of the institution's financial products and services”
- SARs are inherently subjective
- Even companies that establish a comprehensive anti-money laundering program can be tripped up by unusual suspicious activity

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## BSA Criminal Investigations

- **Bank of New York**
  - Failure to file an SAR for fraudulent transactions by BNY's customer
  - Non-prosecution agreement with DOJ
  - \$38 million settlement

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## BSA Criminal Investigations *(cont'd.)*

### ➤ Riggs Bank

- Failure to file SARs regarding fraudulent use of its accounts by Augusto Pinochet of Chile and the government of Equatorial Guinea
- Pleaded guilty and paid \$16 million criminal fine

### ➤ AmSouth Bank

- Failed to file SAR although it knew of accounts used for international Ponzi scheme
- Deferred prosecution
- \$40 million forfeiture, \$10 million civil fine

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## BSA Civil Enforcement

### ➤ ABN Amro

- \$80 million penalty, criminal investigation ongoing

### ➤ Arab Bank

- \$24 million civil monetary penalty for failure to file SARs

### ➤ Banco de Chile

- \$3 million civil fine for failure to maintain adequate controls

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## Other

- Foreign tax evasion / wire fraud
- Foreign asset controls
- Aggressive and innovative state criminal enforcement authorities