

**PRESENTED AT**

**3<sup>rd</sup> Annual Government Enforcement Institute**

September 29-30, 2016  
Houston, Texas

## **Surviving Internal Investigations and Prosecution: A General Counsel's Personal Experience**

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# THE NEW CORPORATE GATEKEEPER

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## I. INTRODUCTION

The term “gatekeeper” is used with some regularity these days to describe the roles of various professionals who work to keep corporations from running afoul of the law in their dealings with the public, thereby helping to avoid harm to investors and the markets.<sup>1</sup> For

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The author appreciates the comments and suggestions of Professors Laura Bartell, Kingsley Browne, Stephen Calkins, Paul Dubinsky, Noah Hall, and Arthur Laby.

1. There is no single definition of what constitutes a gatekeeper for a corporation whose securities are traded in the public markets. See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984):

Gatekeeper liability has received widest play in response to securities violations and similar “transactional” delicts rather than in response to wrongdoing that occurs wholly within the bowels of the firm. Gatekeepers can be drafted from among the many outsiders who supply specialized expertise to the managers of publicly-held corporations and facilitate their relations with constituencies outside the firm: outside directors, lawyers, accountants, and investment bankers.

*Id.*; Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 946 (1998):

The traditional gatekeeper acts as both a centralized source of information and decisionmaker in removing products from the market. Purchasers may simply look to see which products make it to the market to determine whether the product made it through a gatekeeper’s screening process. Regardless of the purchasers’ level of sophistication or knowledge, traditional gatekeepers ensure that buyers purchase products above only a certain level of quality.

*Id.*; John C. Coffee, Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1297 (2003) (“[G]atekeepers are independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status.”) [hereinafter “*Attorney As Gatekeeper*”]; Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 123 (2006) (“[A] person or firm that provides verification or certification services or that engages in monitoring activities to cabin illegal or inappropriate conduct in the capital markets.”); Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323, 327 (2007)

example, auditors are charged with reviewing corporate financial statements to ensure they accurately reflect assets and liabilities, while investment bankers require sufficient disclosure of the risks facing a company when it seeks to sell securities to the public. Even lawyers have seen the label slapped on them for how they advise clients on transactions.

Corporate counsel have come to be seen as one on the roster of financial gatekeepers because they are well-equipped to prevent violations, using their authority to keep a deal from happening if it is tainted by fraud or misrepresentations.<sup>2</sup> Professor John Coffee points out that corporate lawyers, unlike litigators, oversee the due diligence process and prepare disclosure documents used in a range of deals, from bank loans and government contracting to selling stocks and bonds in the markets, putting them in a position to call a halt if there is anything untoward.<sup>3</sup>

Calling someone a gatekeeper is a pithy shorthand for recognizing an obligation to monitor compliance with the law. There is a nagging fear

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(“Gatekeepers work with an enterprise to correct misreporting before it occurs. They do so by threatening to withhold support necessary to complete a report or consummate a transaction. Gatekeepers can deny access to capital markets.”); Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413 (2008) (“[P]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives.”); Emerich Gutter, *Whistleblowers Under the Dodd-Frank Act and Their Impact on Gatekeepers*, 30 REV. BANKING & FIN. L. 753, 755 (2011) (“Gatekeepers help prevent the formation of a market for lemons by reducing the impact of informational asymmetries. Because gatekeepers are perceived as credible, independent parties, their investment of reputational capital assures the market of an activity’s legitimacy.”). Regardless of the definition one might choose, the role of the gatekeeper is to serve as an intermediary to prevent misconduct by the corporation.

2. Professor Coffee argues that focusing on gatekeepers may be a more effective way of policing corporations:

Because the gatekeeper will receive little, if anything, from corporate involvement in crime or misconduct, [so] it can be deterred more easily than can the corporation or its managers, who may profit handsomely from crime or who may be tempted to engage in criminal activities to achieve goals or thresholds that allow them to remain in office.

Coffee, *supra* note 1, at 1297. Professor Morgan, on the other hand, takes a much less sanguine view of labeling lawyers as gatekeepers, asserting that the term “is almost useless” and warning that if the lawyer has one of the few companies looking to act dishonestly, “you should get out of that representation immediately.” Thomas D. Morgan, *Comment on Lawyers As Gatekeepers*, 57 CASE W. RES. L. REV. 375, 377 (2007).

3. JOHN C. COFFEE, JR., *GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE*, 192 (Oxford 2008) [hereinafter “GATEKEEPERS”]. Professor Laby notes that “[a]ll gatekeepers are not alike,” and there is a need to distinguish the roles played by those who are independent of the corporate client, like an outside auditor, from those who work within the organization or are retained directly by it, such as lawyers. Laby, *supra* note 1, at 120.

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First appeared as part of the conference materials for the

3<sup>rd</sup> Annual Government Enforcement Institute session

"Surviving Internal Investigations and Prosecution: A General Counsel's Personal Experience"