

# A New Era of Environmental Criminal Enforcement

October 22, 2024

**GIBSON DUNN**

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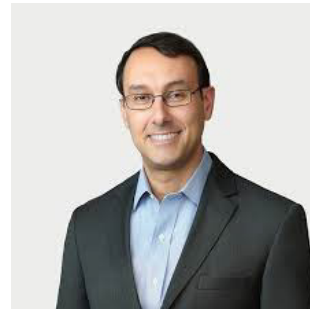
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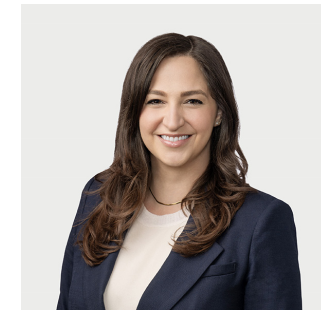
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# ENVIRONMENTAL CRIMINAL ENFORCEMENT

- 01 Introduction to Environmental Criminal Enforcement
- 02 Policy Developments
- 03 Enforcement Case Studies
- 04 Potential Impacts of the 2024 Election

# Environmental Criminal Enforcement



## Environmental Protection Agency

- Primary rule-making body for federal environmental regulations.
- Adjudicates administrative civil enforcement actions.
- **Criminal enforcement** actions are adjudicated in **judicial forums** and referred by the EPA to the Department of Justice, which assumes responsibility for filing charges and prosecuting offenders.
- EPA **Office of Enforcement and Compliance Assurance** (OECA) assumes primary responsibility for identifying and investigating violations and provides expert support to criminal and civil federal and state enforcement actions.
- EPA **Criminal Investigation Division** (CID) resides within OECA and serves as the EPA's law enforcement division. The division employs approximately 190 criminal investigators.

## Department of Justice, Environment and Natural Resources Division

- Criminal prosecutions are handled by the **Environmental Crimes Section (ECS)** of the **Environment and Natural Resources Division (ENRD)**.
- The ECS employs more than 40 prosecutors working approximately 235 active cases.

# DOJ and EPA FY 2023 Enforcement Actions

## 199

Cases opened by the EPA criminal enforcement program in FY 2023

- An **increase of 70%** from FY 2022
- **102 defendants were charged** in FY 2023. This was lower than any year since FY 2019, but EPA projects that number of defendants charged will rise as a result of increased case openings

## 74%

Number of cases in which an individual (non-corporate) defendant was charged

- Individual defendants were sentenced to a total of **106 years of incarceration**
  - U.S. v. Kingston (D. Utah) – Five individuals sentenced to prison for a combined **84 years** for their roles in \$1 billion Renewable Identification Number (RIN) fraud conspiracy.
  - U.S. v. Andrecola (D. N.J.) – Small business owner sentenced to 60 months incarceration for sales of falsely labeled and unregistered pesticides.

## 100%

The EPA criminal enforcement program's FY 2023 conviction rate

- **DOJ ENRD** reported a favorable outcome in **96%** of its criminal enforcement actions
  - United States v. E.I. du Pont de Nemours and Co. (S.D. Tex.) – DuPont operations leader sentenced to **one year probation**
  - United States v. GDP Tuning (D. Idaho) – **2 year sentence** for selling electronic defeat software and devices
- EPA criminal enforcement monetary Recovery:
  - **\$536,053,678** in fines and restitution; **\$4,550,000** in court-ordered environmental projects; **\$521,080,099** in forfeited illegal proceeds

# Policy Updates

02

# Federal Compliance and Enforcement Priorities **FY24–FY27**

EPA has updated the **National Enforcement and Compliance Initiatives** (NECIs) for 2024 to 2027:

Reducing air toxins in overburdened communities

Mitigating climate change  
**(new for FY24)**

Addressing exposure to PFAS  
**(new for FY24)**

Reducing risks of accidental releases at industrial and chemical facilities

Protecting communities from coal ash contamination  
**(new for FY24)**

Reducing drinking water standard non-compliance at community water systems

*“Three cross-cutting goals:  
Goal 1: Tackle the **Climate Crisis**  
Goal 2: Take Decisive Action to Advance **Environmental Justice**  
Goal 3: Enforce Environmental Laws and **Ensure Compliance**”*



# Federal Compliance and Enforcement Priorities **FY24–FY27**

EPA has determined that **three** prior enforcement initiatives will return to the **core enforcement program**:

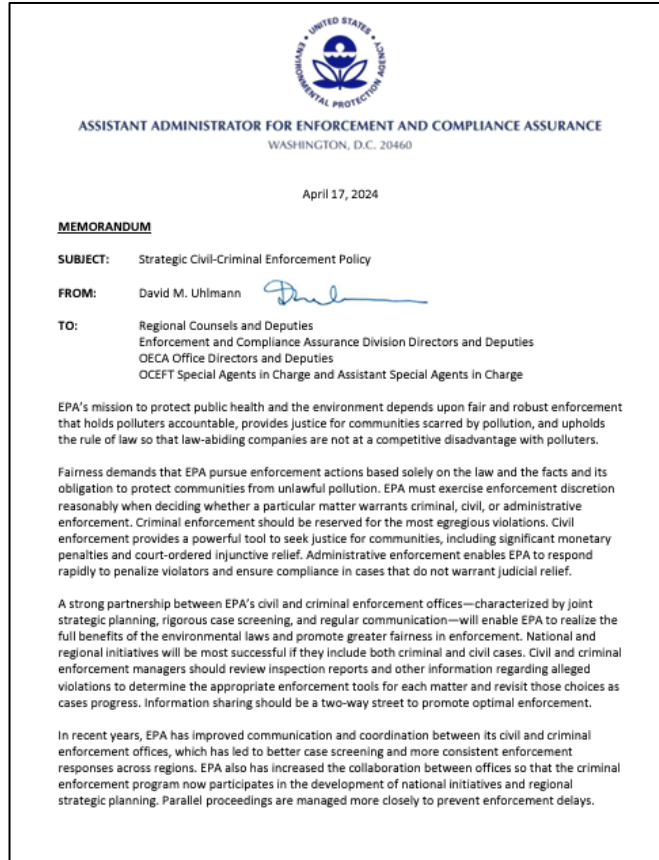
Stopping aftermarket  
defeat devices

Reducing hazardous air  
emissions from waste  
facilities

Reducing significant  
NPDES program non-  
compliance

*“Initiatives returned to the core enforcement program **remain important areas for enforcement** and compliance efforts, even though they are **no longer national initiatives.**”*

# EPA's Strategic Civil-Criminal Enforcement Policy (April 2024)



## Collaboration Throughout Strategic Planning Process

- Joint development of national and regional enforcement priorities
- NECI Steering Committees must include both civil and criminal representation

## Regular Consultation Throughout Enforcement Process

- Initial case screening for cases with civil and criminal equities
- Continued coordination throughout life of all enforcement actions

## Improved Case Management Through Enhanced Tracking, Info. Sharing

- Interim shared system for non-criminally sensitive information
- Develop shared national databases for case tracking

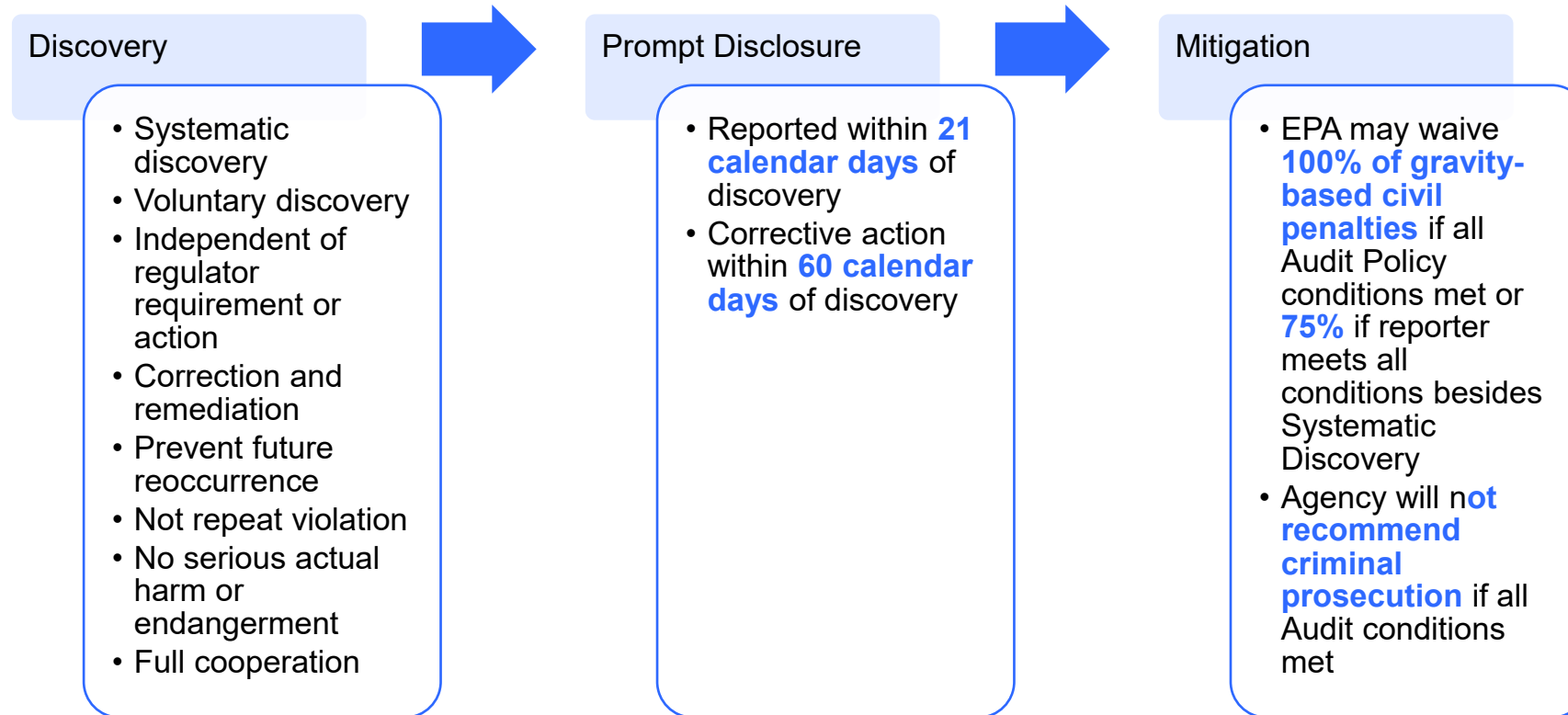
## Training to Strengthen Civil-Criminal Partnership

- Strengthen civil-criminal relationships
- Ensure proficiency in managing parallel proceedings

# EPA Audit Policy

- The **EPA Audit Policy** provides incentives for regulated entities to **proactively ensure regulatory compliance** and **voluntarily disclose violations** identified through internal compliance programs.
- The policy offers **a significant reduction** to civil, gravity-based penalties.
  - EPA may still act to collect economic benefits received as a result of noncompliance.
- EPA will **not recommend criminal prosecution** of the disclosing entity if the program's conditions are met.

# EPA Audit Policy: **Voluntary Self-Disclosure**



*“EPA’s Audit Policy safeguards human health and the environment by providing **several major incentives** for regulated entities to **voluntarily discover and fix violations** of federal environmental laws and regulations.”*

# DOJ Voluntary Self- Disclosure Policy

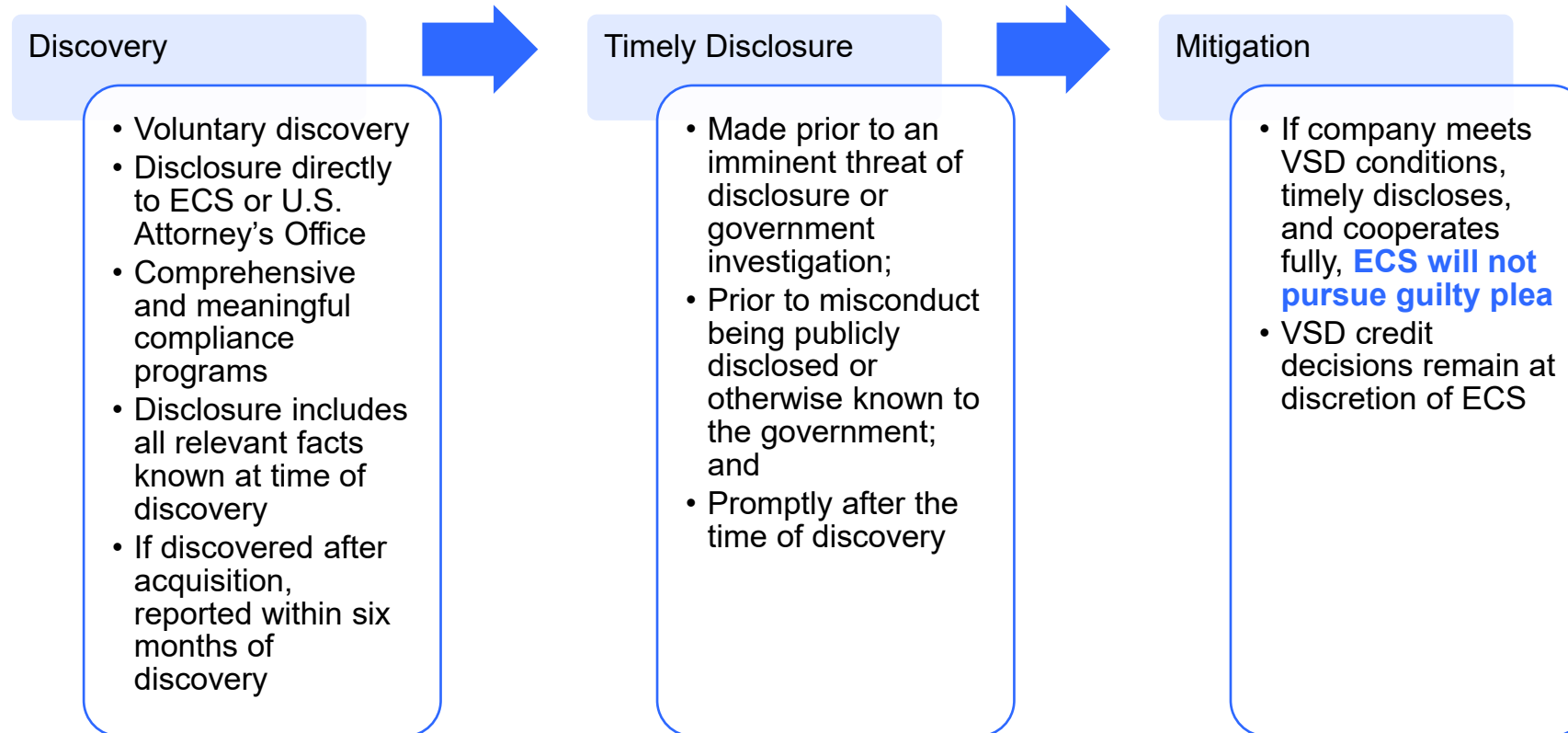


## Environmental Crimes Section Environment & Natural Resources Division Voluntary Self-Disclosure Policy

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- The DOJ maintains a separate **voluntary self-disclosure** (VSD) policy for voluntary self-disclosure of environmental law violations by companies.
- DOJ's policy is designed to create protection in the event of a criminal prosecution as opposed to civil enforcement.
- The Voluntary Self-Disclosure Program is intended to **encourage self-policing, ethical and sustainable corporate governance**, and responsible risk management practices.
- The ECS VSD policy was updated in March 2023 in response to Deputy Attorney General Lisa Monaco's September 2022 memorandum (the "**Second Monaco Memo**") and its directive that DOJ offices review and clarify their VSD policies.
  - The revised policy emphasizes that evaluations of corporate compliance programs will rely on DOJ guidance, including the Justice Manual and the First and Second Monaco Memos.
  - Notably, the Monaco Memos have emphasized the role of executive compensation structures in incentivizing compliance.

# DOJ Environmental Crimes Section **Voluntary Self-Disclosure**



*Policy Goals: “[E]ncourage self-auditing, self-policing, and voluntary self-disclosure of criminal conduct by companies by indicating that these activities are viewed as mitigating factors in ECS’s exercise of **criminal environmental enforcement discretion**.”*

# Enforcement Case Studies

03

# Enforcement Case Studies: Defeat Devices

DOJ/EPA are continuing to investigate and pursue both civil and criminal enforcement actions against **manufacturers and distributors of defeat devices**:

- EPA touts “significant progress” on the defeat device initiative—including the resolution of more than **170 cases**, addressing over **539,000 violations**—since its inception in FY20.
- As a result of the defeat device initiative, DOJ and EPA have collected more than **\$55.5 million** in civil penalties and **\$5.6 million** in criminal fines.
- In January 2024, **Cummins** settled with DOJ, EPA, CARB, and CAAG for the use of software defeat devices in nearly 1 million vehicles and agreed to pay a **\$1.675 billion** penalty—the **largest civil penalty in Clean Air Act history**.
- In 2024, it was announced that DOJ had closed the criminal investigation into Mercedes-Benz. **Mercedes-Benz** achieved the first—and to date, the **only**—**declination by DOJ** issued to an auto manufacturer as part of the United States’ diesel emission enforcement initiative.
- In September 2024, Rudy’s Performance Parts agreed to pay **\$3 million in criminal fines** for manufacturing, selling, and installing over 250,000 defeat devices.





# Enforcement Case Studies: CAA

- Explosions at TPC's facility released **more than 11 million pounds** of hazardous substances and caused **more than \$130 million in offsite property damage** and other impacts to human health and the environment.
- In May 2024, DOJ and EPA announced felony criminal charges and a related civil complaint and consent decree under the CAA .
  - TPC is required to report safety information and overhaul its hazard analysis program to ensure prompt completion of corrective actions and remedial measures.
- TPC Group also **pleaded guilty to a violation of the CAA** and agreed to pay \$18 million in criminal fines.



# Enforcement Case Studies: HFCs

- Passed in 2020, the [AIM Act](#) prohibits importation of [hydrofluorocarbons \(HFCs\)](#) without allowances from EPA.
- DOJ announced its [first criminal prosecution](#) under the AIM Act in March 2024.
- Michael Hart was charged with [smuggling greenhouse gases](#) into the United States from Mexico and [selling them for profit](#).
- According to the indictment, Hart posted the refrigerants for sale on [ecommerce platforms](#) such as OfferUp and Facebook Marketplace.
- Hart is scheduled to be sentenced in December 2024.



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PRESS RELEASE

## San Diego Man Receives First Conviction in Nation for Illegally Importing Harmful Greenhouse Gases into the United States

Tuesday, September 24, 2024

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**For Immediate Release**  
U.S. Attorney's Office, Southern District of California

SAN DIEGO – Michael Hart of San Diego pleaded guilty in federal court today, admitting he conspired to illegally import potent greenhouse gases known as hydrofluorocarbons (HFCs) into the United States from Mexico and sell them for a profit in violation of regulations intended to slow climate change. In addition to greenhouse gases, Hart admitted to conspiring to illegally import hydrochlorofluorocarbons (HCFCs), namely HCFC 22, an ozone-depleting substance banned under the Clean Air Act.

# Enforcement Case Studies: eBay

- In September 2023, **DOJ sued eBay**, alleging that the platform unlawfully sold and distributed **aftermarket defeat devices in violation of the CAA, methylene chloride for paint removal in violation of TSCA, and unregistered pesticides in violation of FIFRA.**
- In September 2024, the court **dismissed** DOJ's case against eBay in full, holding:
  - eBay is **not a seller or distributor** under the CAA, TSCA, or FIFRA because eBay does not transfer title or possession of items or place them into the stream of commerce;
  - eBay **does not cause sales** because it does not direct or induce them; and
  - **Section 230 of the Communications Decency Act** bars DOJ's claims because eBay is the publisher, rather than the author, of the product listings at issue.
- This decision will have far-reaching implications for DOJ and EPA's enforcement authority over ecommerce platforms.



# Election Impacts

04

# Election Impacts

A **Harris Administration** is likely to provide continuity in enforcement priorities and approaches with the current administration. It has the potential to take a more aggressive stance in bringing environmental enforcement actions against corporations, particularly criminal enforcement and enforcement for violations in overburdened communities.

- During the 2020 presidential campaign, Vice President Harris expressed interest in **pursuing environmental crimes**.



*“I have always felt strongly that the role should be to go after ... these powerful interests that are creating incredible harm in our communities, and without consequence creating that harm. And **let’s get them not only in the pocketbook**, but, you know, let’s make sure that there are **severe and serious penalties for their behaviors**.”*

-Candidate Kamala Harris, 2020

# Election Impacts

During her tenure as California's Attorney General, Vice President Harris participated in a number of **high-profile environmental lawsuits**:

- California joined the **Volkswagen diesel case**, receiving \$1.18 billion.
- In 2016, California initiated civil enforcement action against Volkswagen, resulting in an **additional \$86 million in civil penalties**.
- In 2011, the State brought a first of its kind **“greenwashing” lawsuit** against companies that claimed their plastic water bottles were “100 percent biodegradable and recyclable.”
- In 2013, the State brought civil suits against **BP, ARCO, Phillips 66** and **ConocoPhillips** for violations of state law governing storage of hazardous materials at gas stations.
- In 2014 and 2015, California sued **AT&T and Comcast** over the companies' **electronic waste disposal practices**.

**Potential areas of focus:** Climate change (methane emissions, HFCs); PFAS; coal combustion residuals; emissions in overburdened communities; use of emergency authority

# Election Impacts

A second **Trump Administration** is likely to mirror the environmental enforcement priorities of former President Trump's first term.

- EPA focused on achieving **landmark penalties** against vehicle manufacturers such as Fiat Chrysler for **defeat devices** in diesel vehicles, against Home Depot for violations of **lead paint regulations**, and against **Superfund PRPs** like NCR Corp. at the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund Site and Atlantic Richfield in Butte, Montana.
- **Potential areas of focus**: Drinking water (PFAS, Lead, community water systems); Superfund, criteria pollutant and HAP emissions, emergency response, RFS RIN fraud
- Reduced use of **Supplemental Environmental Projects (SEPs)** in enforcement settlements.



*“[President Trump told me] ‘Andrew, I want you to continue cleaning up our air, continue cleaning up our water, and deregulate to create more jobs for the American public.’ He knew **we can do all three** at the same time. And so do I.”*

-EPA Administrator Andrew Wheeler, 2020

# Upcoming Programs – Fall White Collar Webcast Series

Date and Time	Program	Registration Link
<p>Thursday, October 24, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p><b>SEC Enforcement Update</b> Presenters: Mark Schonfeld, David Woodcock, Tina Samanta</p>	<p><a href="#">Event Details</a></p>
<p>Thursday, November 7, 2024 1:00 PM – 2:30 PM ET 10:00 AM – 11:30 AM PT</p>	<p><b>False Claims Act Enforcement in the Life Sciences and Health Care Sectors</b> Presenters: John Partridge, Jonathan Phillips, Katlin McKelvie, Jim Zelenay</p>	<p><a href="#">Event Details</a></p>
<p>Wednesday, November 13, 2024 3:00 PM – 4:00 PM ET 12:00 PM – 1:00 PM PT</p>	<p><b>Government Investigations into AI Systems</b> Presenters: Eric Vandevelde, Chris Whittaker, Poonam Kumar</p>	<p><a href="#">Event Details</a></p>
<p>Thursday, November 14, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p><b>Criminal Antitrust Enforcement: A Preview of Priorities for the New Administration and Implications for Corporate Compliance Programs</b> Presenters: Scott Hammond, Jeremy Robison, Alexandra Buettner</p>	<p><a href="#">Event Details</a></p>



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