

Practical Advice in the Post-Enron Era

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In the past, business law and criminal law were distinct, and prosecutors at both the state and federal levels were busy pursuing murderers, rapists, drug dealers, and car thieves. Now, however, captivating the media's attention as well as politicians' and prosecutors', business executives have become the subjects of scorn and public persecution.

Although some corporate executives at Enron, Tyco, and Rite Aid deserve to be prosecuted to the fullest extent of the law, increased government scrutiny has led to the investigation of honest, hard-working corporate executives and corporate practices that were previously considered legitimate.

There may also be some corporate employees who, in the name of the corporation, have actually violated the law; but for those companies and employees who are committed to best practices, here is broad, practical advice on the process and resolution of a business crime allegation.

Discovery of an Allegation

No business is immune from a criminal allegation. A corporation may become aware of an allegation of criminal activity within the corporation in any of the following ways:

1. It may receive a **subpoena** for records from either state or federal authorities.
2. There may be a **search warrant** executed for corporate records or equipment such as computers and files.
3. The corporation itself or certain corporate officers may receive a **target letter** from the United States Attorney.
4. Corporate officials may become aware of illegal or potentially illegal activities themselves, through **self-discovery**.

Gone are the days when corporate officials could simply stop the illegal activity and pretend it never happened. Today, early and active legal intervention is almost mandatory to ensure the legal rights of the corporation, its officers, and employees are protected.

Grand Jury Subpoenas

A grand jury subpoena typically involves an order issued by a court directing the production of records. It will usually be delivered by a state or federal agent and will request the production of certain documents. A company who receives a subpoena may or may not be the subject of a criminal investigation; however, it would be prudent to retain counsel to review the subpoena and to determine if the company faces any potential criminal prosecution.

Search Warrants

By contrast, a search warrant is an order by a judge to search a certain location and to seize specific items of evidence. A search warrant must be supported by probable cause,

which requires the government to prove to a judge that there is reason to believe a crime has been committed and that evidence of that crime is located in the place to be searched. A search warrant normally indicates that a criminal investigation is ongoing.

Target Letters

A target letter is from the United States Attorney, or one of his or her assistants, notifying the “subject,” the person or entity to whom the letter is addressed, that he or she is the subject of a grand jury investigation. The purpose of the letter, generally, is to initiate contact between the government and a criminal defendant. Defense counsel will be able to enter into dialogue at this point with the government and may be able to avert a criminal indictment.

Allegations by an Employee or Customer

Frequently, an employee or customer will contact a company indicating that a company employee has made some misrepresentation to a customer, falsified a government-required document, or engaged in otherwise unethical conduct. The allegation may be true or false, and the conduct may be illegal or legal; however, as soon as a concern arises, corporate officials need to gather all the facts to determine first, if there is a problem, and second, if there is what the scope of the problem is.

What to Do

The corporation should take immediate steps to mitigate the problem. This may include terminating the offending employee, refunding money, instituting a training program, or similar actions.

What *Not* to Do

Corporate officials should not discuss the allegations until they have had the benefit of a complete investigation. Damaging documents, e-mails, and memoranda should be retained. Frequently, evidence of the destruction of evidence will be used by the government to show intent or guilty knowledge, and may, in some cases, support a charge of obstruction of justice. The creation and back-dating of memoranda or correspondence to try to explain a prior event can be used as evidence of a cover-up. A full, complete, and competent investigation needs to be undertaken as soon as possible by counsel experienced in business crimes.

Most corporations lack the expertise to conduct an investigation, and most corporate counsel are unfamiliar with business crimes. Even if a corporation was to undertake an investigation, it is likely that the substance of the investigation would be discovered by authorities at a later time and could be used as evidence against the corporation or its officials.

Tips on Obtaining a Quick Resolution

A corporation that receives an allegation of potential criminal activity should retain an attorney experienced in business crime cases to conduct a legal audit of the questioned activity. The attorney could then retain investigators or other experts to assist in the examination of allegations.

For example, if accounting practices are questioned, it may be appropriate to retain a forensic accountant to review the records. An investigator may be appropriate to interview witnesses or potential witnesses. Once a full investigation has been completed, the attorney can advise the corporation on how to proceed.

If it is necessary to report criminal conduct to authorities, the lawyer can advise the client how to do so and can work with authorities to minimize the corporation's and its officers' potential criminal exposure.

When an attorney is retained by the corporation to represent the corporation, he or she cannot simultaneously represent the directors, officers, or employees. It would be inappropriate for any attorney representing the company to counsel witnesses or potential defendants.

At least in the preliminary stage where criminal wrongdoing has not yet been identified, a single attorney or law firm to represent the corporation is probably sufficient. If wrongdoing is discovered, then the potential suspects should be advised to immediately retain their own counsel. In many instances, the corporation will be required to pay for a suspect's legal expenses.

Dos and Don'ts When Served a Subpoena or Target Letter

Upon receipt of a grand jury subpoena or a target letter, the corporation should immediately retain counsel experienced in business crimes who can initiate contact with the government to try to discover the basis for the contact.

As with self-discovered crimes, it may be necessary to retain experts or investigators to try to determine the full extent of any problem. Corporate officials should not contact the authorities themselves. By the time a grand jury subpoena or a target letter has been issued, it is likely that the government already has developed a case.

Generally speaking, talking to the government agents at this point does more harm than good. All contact should be handled through counsel. In fact, talking to anyone other than counsel can be extremely dangerous and damaging.

If agents show up at corporate headquarters to conduct a search, there is very little anyone can do to prevent the search. We recommend that an on-site corporate officer identify the records and equipment being sought and make them available to the agents present in order to limit the intrusion and interference with normal business operations as much as possible.

An on-site senior officer should obtain a copy of the search warrant and contact counsel immediately. There is no obligation or reason to talk to the agents conducting the search, and conversation should be avoided. If the search is illegal, nothing can be done at the scene; it can only be addressed through subsequent court proceedings.

Were an agent to show up at your office unannounced and indicate that he has a warrant, but, nevertheless asks for consent to search, the corporation should *never* consent to the search. Consenting to a search waives all claims that the search was not based upon probable cause. It also allows agents to go beyond the scope of a warrant to look at anything present.

If the agent has a warrant, the corporation is obligated to allow him or her to search, and upon presentment of the warrant, should step out of the way. If the agent does not have a warrant, however, he or she should not be allowed to enter the premises and counsel should be contacted immediately.

Uncomplicating the Law

Investigations of businesses, even legitimate business operations, are becoming more frequent. Whenever an allegation of a crime or potential crime comes to the corporation's attention, or whenever a subpoena, warrant, or target letter has been received, early and active advice from an experienced business crimes attorney can have a significant impact on the business's future.

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