

INTRODUCTION

Corporate America and foreign companies that operate within the United States continue to face great challenges with U.S. criminal prosecutors and federal and state regulators. Now several years after the fall of Enron, the enactment of statutes like the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the Patriot Act), the establishment of a Corporate Fraud Task Force, and the high-profile prosecutions of Arthur Andersen and executives from Enron, WorldCom and Adelphia, among others, the government continues to expand the traditional boundaries of criminal and civil enforcement.

Several years ago, the government promised “real time” enforcement of corporate fraud at all levels through coordinated efforts between federal agencies, prosecutors and investigators. The Department of Justice stated that “numerous high-profile acts of deception in corporate America had shaken the public’s trust in corporations, the financial markets, and the economy,” and it promised an “aggressive, team-oriented approach” to its corporate fraud enforcement matters. Since then, the government has kept that promise. Within 28 months of establishing the Corporate Fraud Task Force, the government charged more than 900 violators in more than 400 cases, including the convictions (through settlements or trial) of 500 violators.¹ Since then, the government has moved beyond simply targeting the corporate wrongdoers to holding accountable those who fail to take appropriate action in response to corporate wrongdoing.

Three of the most significant developments over the past several years are (1) the government’s enforcement focus on corporate gatekeepers, such as attorneys, auditors and individual members of corporate Boards of Directors, (2) the ever increasing demands on companies during investigations of corporate transgressions, and (3) penalties exacted on companies for failures of their crisis responses. Such cases demonstrate the government’s high expectations for corporate America and those who are tasked with the responsibility to police and appropriately respond to corporate transgressions and the repercussions for failing to live up to those expectations. Those expectations include higher standards for achieving credit for cooperation, including the hotly contested requirements that

¹ See <http://www.usdoj.gov/usao/mow/news2004/director.awd.pdf>; see also http://www.usdoj.gov/criminal/press_room/speeches/2005_3853_rmrkCrimLuncheon030205.pdf (citing over 600 corporate fraud convictions in total).

companies waive the attorney-client privilege and attorney work product protection or agree not to indemnify individuals who are targets of a government investigation. Also, the government has broadened its prosecutorial reach and has brought charges, under certain circumstances, against employees who make false representations to company counsel where counsel later reported those statements to prosecutors.

In addition to aggressive enforcement activity, Sarbanes-Oxley, the Patriot Act and amendments to the United States Sentencing Guidelines have drastically increased the government's leverage against criminal targets by lengthening prison terms for white collar offenses from 5 to 25 years and, in some instances, to life imprisonment. The importance of understanding these laws and the enforcement priorities of the Department of Justice and other law enforcement agencies cannot be overstated. Federal prosecutors are now more than ever focusing greater attention on and targeting executives, their businesses and the gatekeepers who are tasked with policing them.

What do the developments of the past few years mean for corporate America? The developments require more than ever that corporate America is proactive and takes steps to prepare itself for the inevitable moment when some subsidiary, division manager or corporate employee is suspected of committing a criminal or regulatory transgression. It is no longer enough for companies to simply implement corporate compliance programs. Rather, companies must evaluate their weaknesses and develop comprehensive crisis management plans that will establish best practices and processes in the event a crisis occurs so that the company and its gatekeepers are not caught flat-footed. For example, a company's general counsel should know what his or her obligations are under Sarbanes-Oxley and any implementing rules in the event he or she receives a report that a violation has occurred. The general counsel should also prepare procedures for prompt and thorough internal investigations of perceived problems so that informed and reasoned decisions can be made about the best courses of corporate action. The general counsel should also know what insurance coverage the company carries, any triggering notification events, and other related requirements which may impact coverage for the underlying liability and, potentially, the costs of the investigation. Federal prosecutors require that a company engage in self-policing, voluntary disclosures and heightened cooperation with the government if something goes awry, and are singularly unforgiving of missteps or failures to appropriately respond to corporate transgressions. Therefore, corporate crises must not only be managed, they must be managed effectively.

This Handbook has been prepared by Morgan Lewis' Corporate Investigations and White Collar Practice Group, in consultation with experienced Morgan Lewis attorneys specializing in various regulatory areas. The Handbook first highlights the government's recent focus on crisis management and identifies key elements of a crisis management plan. The Handbook then provides a detailed review of issues that can arise during the course

of a corporate internal investigation including, among others, the preservation of the attorney-client privilege and work product protection, insurance coverage, matters related to employee interviews and representation of employees by separate counsel, document preservation and production issues, and avoidance of obstruction of justice-related charges. The Handbook also discusses the scope of a business's liability for the actions of its employees and the use of compliance programs to avoid or minimize potential criminal liability. The Handbook then discusses top enforcement priorities for prosecutors and federal and state regulators including securities, healthcare, tax and procurement fraud, and antitrust, environmental, energy, Foreign Corrupt Practices Act (FCPA), financial services and banking violations, as well as other important investigative initiatives. Finally, the Handbook looks at trends in white collar enforcement in the coming year.