

White collar crime
Preparing for enhanced
enforcement



No one would mistake Bull Shoals, Arkansas, pop. 2,000, for London, England, pop. 8,000,000. But the two places shared a dubious distinction in January 2010. Law officers fanned out across London, Bull Shoals, 11 other U.S. communities, and Israel to execute search warrants in an investigation of schemes to bribe foreign government officials. In a related undercover operation, which involved an FBI operative posing as the minister of defense for an African country, agents arrested 21 defendants participating in a Las Vegas trade show and one in Miami in connection with bribery attempts made to obtain and retain business.

The U.S. Department of Justice (DOJ) 'sweep' and trade show sting operation, which targeted the military and law enforcement products industry, represented the largest single enforcement action against individuals ever by the DOJ under the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits bribing foreign government officials to obtain or keep business.

A businessperson not engaged in the international arms trade might view the raids as a singular event in a business especially susceptible to nefarious behavior. But that is by no means the case.

The DOJ initiative is only the most gripping example of an intensifying focus on white collar crime at multiple levels of government. In our combined 60 plus years of public and private investigations experience, we have never seen such a confluence of factors coming to bear on bad business behavior, both in the United States and abroad: expansive anticrime legislation; reinvigorated and increasingly coordinated investigations and prosecutions; more federal spending on law enforcement; and new investigative techniques.

As dramatically demonstrated in the FCPA sweep and sting operation, these enforcement efforts increasingly *target individuals for prosecution*. Law enforcement is watching what you do like never before, whether you are with a company engaged in global trade, or one that only does business within a single U.S. state.

The enforcers are also better equipped for the job than in the past. Special units are focusing on particular industries. Different enforcement arms that find areas of common interest are forming task forces and sharing more information, both within the U.S. and between the U.S. and other nations.

You can better protect yourself in this era of unprecedented investigations and enforcement by understanding your risks, preparing for an array of potential enforcement actions, and making needed investments in risk assessment, compliance, prevention, and detection. This also means knowing what steps to take in the event you or your company are served with a subpoena.

Many sets of watchful eyes

At a time when white collar crime enforcement is on the upswing, many companies may be underestimating their exposure to scrutiny. Fewer than half of respondents to a recent Deloitte Dbriefs Webcast poll said they were concerned about their company or executives being subjected to a regulatory investigation in the next year.

Some businesspeople may not be considering the many different directions from which a probe can come. Perhaps not surprisingly, nearly 40 percent of the Dbriefs poll respondents cited the U.S. Securities and Exchange (SEC) as the entity whose oversight and policies would have the most impact on their company's operations in the next year. The U.S. Congress was a relatively distant second at 17 percent.

But as the diagram below shows, the SEC and the Congress are not the only sources of potential scrutiny and action. The DOJ, the FBI, the Internal Revenue Service (IRS), and state attorneys general are all increasing their focus on white collar misdeeds, any of which could arrive at your door bearing a writ or summons. While an investigation could start with any one of these or other agencies, parallel proceedings and investigations involving multiple agencies or special task forces could quickly ensue.

Multi-faceted problems



A ring of enforcement

To a great extent, the impetus is coming from the very top. The Obama administration has increased enforcement in the areas of securities fraud, the FCPA, health care fraud, government contract fraud, antitrust violations, and environmental law. State attorneys general are playing a growing role in upholding consumer and investor protection laws, and other countries are also increasing enforcement efforts.

Stepped up SEC activity

The SEC Division of Enforcement has restructured itself and is undertaking several initiatives to strengthen investigations and enforcement. The division has formed five units that bring structure, resources, and expertise to addressing five specific commission priorities: asset management, market abuse, structured and new products, the FCPA, and municipal securities and public pensions.

The SEC is expected to be increasingly aggressive in pursuing cases against individuals. It is also collaborating with other enforcement agencies using tools including cooperation agreements, deferred prosecution agreements, and non-prosecution agreements. The newly formed Office of Market Intelligence will collect and assess tips, complaints, referrals, and other information flowing to the SEC. All these initiatives are being funded from an SEC budget that has increased more than 11 percent from last year to \$1.23 billion.

Growing FCPA enforcement

The DOJ and the SEC jointly enforce the FCPA. The DOJ focuses on the act's anti-bribery provisions and the SEC focuses on its 'internal controls' and 'books and records' provisions.

The SEC's FCPA enforcement unit, new cooperation initiatives, and targeting of individuals are likely to increase cases initiated by the commission. The DOJ, meanwhile, is expanding its field of interest. While DOJ cases previously have focused heavily on the energy industry, the department has recently turned its attention to other industries including pharmaceuticals, medical devices, defense, financial services, and IT.

Numbers bear out the increased intensity of FCPA enforcement. In the past year, 58 individuals were charged in enforcement actions. Three trials involving individuals took place in the United States after years of not a single trial under the FCPA. We expect the DOJ and the SEC to put increasing pressure on individuals as an avenue to making cases against companies employing those individuals.

Most white collar cases are made based on documents, whistleblowers, witnesses given immunity, and cooperating defendants. At the same time, the unprecedented sting operation at a trade show in January pointed to the government's increasing interest in using law enforcement techniques in innovative ways.

Law enforcement is also testing new case theories, such as with the FCPA. In a case tried in the federal court in New York, the government pursued prosecution under the theory of willful blindness – that the individual should have known the nature of the person he was dealing with and that the person would have been involved in bribing foreign officials.

In addition to the willful blindness theory, an SEC case settled during the past year was based entirely on the fact that the employee was a control person within the company. While there was no evidence of actual involvement in the bribery scheme or in preparing the company's books and records, the person was held liable for being in a position of responsibility and able to stop the violation.

A close eye on recovery spending

Hundreds of billions of dollars are being spent in the federal government's economic recovery efforts including the American Recovery and Reinvestment Act (ARRA) and the Troubled Asset Relief Program (TARP). While this money is creating opportunities for thousands of businesses and state and local governments, it comes with stringent financial accountability and transparency requirements. The sheer volume of funds involved and the public's concern about waste are helping to drive an intense government focus on rooting out fraud.

The Fraud Enforcement and Recovery Act of 2009 (FERA) extends federal fraud laws, which previously only addressed government procurement, to now cover mortgage lenders and TARP and ARRA fund recipients. The FERA also expands the scope of the False Claims Act (FCA), the statute that imposes liability on businesses for making false statements or claims for government reimbursement.

Other examples of increased enforcement include a Special Inspector General for TARP (SIGTARP), which is collaborating with the FBI and federal prosecutors, and the Financial Fraud Enforcement Task Force formed in November 2009.

Intensified antitrust, environmental and workplace safety enforcement

President Obama is also following through on campaign promises to increase both antitrust and environmental law enforcement. In May 2009, Christine A. Varney, Assistant U.S. Attorney General for Antitrust, withdrew guidelines that had restricted the government's reach in bringing cases against monopolies under Section 2 of the Sherman Antitrust Act. Enhanced enforcement of Section 1, which addresses trade restraints such as price-fixing agreements, is also expected.

Criminal cases for environmental violations are also on the rise. During 2009, the federal government brought 387 new environmental crime cases, a record number. The administration has also announced numerous enforcement priorities including resource conservation. The Lacey Act, amended in 2008 to expand protection to a broader range of plants and animal products, makes it illegal to use products that have been sourced from a protected area in violation of another country's laws. Actual knowledge of a violation is not required for prosecution.

A series of workplace tragedies in April 2010 put workplace safety high on the list of areas in which to expect greater enforcement. A West Coast oil refinery explosion in which seven people perished, the Upper Big Branch Mine disaster three days later in which 29 miners lost their lives, and an oil rig explosion in the Gulf of Mexico in which 11 workers died, led quickly to the government committing to enforce workplace safety laws and regulations more aggressively. Criminal charges may be brought if government investigators find that criminal violations have occurred.

Increased activity at the state level and internationally

State attorneys general are playing a growing role in white collar criminal enforcement, especially in cases involving consumer and investor protection. A number of joint enforcement sweeps involving multiple states, the DOJ, and the FTC have targeted scams intended to take advantage of the economic downturn, mortgage and loan modification programs, and mortgage foreclosures.

Considerable resources have been directed to the states to support these efforts. The 2009 stimulus package included a one-time funding boost for multijurisdictional drug enforcement and new authority for states to enforce the Health Insurance Portability and Accountability Act (HIPAA).

The increase in international coordination is also noteworthy. The SEC has counterparts in countries throughout the developed world. Those agencies are sharing information that is leading to enhanced enforcement activity in the United States, Europe, and other parts of the world.

Steps for getting ready

The changing, intensifying regulatory environment makes it more challenging and important to understand and address your company's exposures.

The effort starts with a risk assessment that examines the laws and regulations applying to your company. Are there particular risks associated with the geographic regions where you operate? What third parties does your company work with – such as agents, distributors and channel partners – and which relationships require oversight?

Effective compliance programs and internal controls rely on a strong tone at the top that is reflected in appropriate resource commitment. It is not enough to say that you are in compliance; you need to be able to demonstrate it at all levels of the company. Other critical program components include due diligence procedures for business partners and acquisition targets; comprehensive personnel training; open communication; channels for employees to safely report violations; periodic reviews and audits; and penalties for noncompliance.

Quick and appropriate response is needed when a problem or violation is detected. Effective preparation includes identifying investigative and response resources in advance of a crisis, as well as creating and documenting fraud and corruption investigation protocols. Establishing a case management system to track fraud allegations will support consistent handling of instances, thereby increasing efficiency and reducing duplication.

Finally, be ready should a subpoena land at your door. Preparation starts with a record retention and destruction policy that meets both the provisions and spirit of applicable law and regulations while limiting the number of documents in play. This approach can reduce both cost and exposure. A discovery readiness plan, defensible to regulators and courts, should include procedures and systems for executing key word document searches; identification and interviews of appropriate document custodians; and establishment and maintenance of a tracking database.

Protect your business — and yourself — in the new era of enforcement

White collar crime is attracting more attention and government action than it has in decades, or perhaps in history. Understanding this heightened focus, identifying your exposures, and taking steps to prevent violations can go a long way toward helping you and your company to avoid the wrath of regulators and law enforcement.

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