

Financial Executives International
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The Current Landscape of Fraud and Abuse Liability for Financial Executives

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Overview

- Financial executives are often on the front line of ensuring that companies are profitable.
- Historically, many financial fraud cases were resolved by the government through agreements solely with the offending corporation.
- Increasing trend towards holding individuals responsible for corporate misfeasance.

Overview



Overview

- Discuss:
 - What do corporate prosecutions look like?
 - Why there is an increase in individual prosecutions?
 - What your organization can do to mitigate exposure?

What Does Federal Enforcement Look Like for Financial Executives?

- Example Criminal Prosecutions Involving Corporations
 - Securities Fraud (Accounting and Investor Fraud)
 - Foreign Corrupt Practices Act Violations
 - Mail and Wire Fraud
 - False statements to the government
 - Embezzlement

Types of Federal Enforcement

- Investment Fraud
 - The SEC rules prohibit any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security.
 - Applies to any security, not just those of publically traded securities.

Types of Federal Enforcement

- Mail and wire fraud
 - There are two elements in mail/wire fraud:
 - (1) having devised or intending to devise a **scheme to defraud**, and
 - (2) use of the mail for the purpose of executing, or attempting to execute, the scheme.
 - The victim can either be a private entity or individual or a governmental entity.

Types of Federal Enforcement

- Foreign Corrupt Practices Act
 - Prohibits both U.S. and foreign corporations and nationals from offering or paying, or authorizing the offer or payment, of anything of value to a foreign government official, foreign political party, party official, or candidate for foreign public office, or to an official of a public international organization in order to obtain or retain business.
 - Requires publicly-held U.S. companies to keep books and records which, in reasonable detail, accurately reflect the disposition of company assets.

Types of Federal Enforcement

- Federal Program Fraud:
 - There are several federal statutes that can be used to investigate and prosecute fraud against the government, including:
 - 18 U.S.C. § 1001 (false statements),
 - 18 U.S.C. § 287 (false claims), and
 - 18 U.S.C. § 371 (conspiracy to defraud the government).
 - Falsely representing compliance with prevailing wage rules on construction project federally funded.
 - Falsely obtaining SBA program set-aside contracts.

Criminal Penalties

- Jail Time:
 - Maximum jail times are set forth in the statute.
 - Actual jail time determined by a number of factors:
 - Amount of the loss to the victim.
 - Aggravating factors such as public harm.
- Criminal financial penalties.

Civil Federal Enforcement

- The government can recover civilly when false claims have been submitted for payment.
- Need a nexus to government funds.
- Government can recover treble damages plus a per false claims penalty.
- The False Claims Act contains provisions that allow a whistleblower to file a suit on behalf of the government and to share in the recovery.

Parallel Investigations

- Criminal and Civil
- Criminal and Regulatory

Individual Liability

- Liability of Individual Corporate Officials
 - The “Yates Memo” - issued by then Deputy Attorney General, Sally Yates, in November 2015.
 - Federal prosecutors were instructed to ensure that all corporate investigations - both civil and criminal - strive to identify any individuals who were responsible for corporate misconduct.
 - If a prosecutor seeks to obtain approval for charges or a resolution, DOJ requires that individual liability be addressed.
 - No approval without that assessment.
 - Currently, undergoing “routine review” by DOJ.

Enforcement Trends

- Volkswagen AG case
 - Volkswagen pled guilty to a scheme that used a “defeat device” that allowed vehicles to inappropriately pass emissions tests.
 - Company paid a \$2.8 billion penalty.
 - Government also charged 6 individuals for conspiracy to defraud the government and to violate the Clean Air Act.
 - Charged individuals, including VW’s head of development, general manager for environmental and engineering office, a VW employee that was a regulatory liaison.

Enforcement Trends

- Wire and investor fraud
 - Two pending indictments against Ron Van Den Heuvel.
 - First case alleges Van Den Heuvel directed employees to obtain loans from banks. Van den Heuvel was unable to qualify for any credit because of past credit history.
 - Van den Heuvel failed to repay the banks and used the money for his own benefit (both personal and to benefit his businesses).

Enforcement Trends

- Wire and Investor Fraud
 - Second case
 - Van Den Heuvel is alleged to have a business plan that involved multiple enterprises that would recycle food waste.
 - Indictment alleges that Van Den Heuvel fraudulently obtained more than \$9 million from lenders and investors by misrepresenting how funds would be used and then diverted funds to other uses (some business and some personal).

Enforcement Trends

- Government Program Fraud
 - The SBA Section 8 program helps small companies owned and operated by socially and economically disadvantaged persons. A firm that is certified under Section 8 program can compete for government contracts that are set aside for Section 8 firms.
 - Department of Veterans Affairs has a similar program - “Service Disabled Veteran Owned Small Businesses” (SDVOSB).
 - Sonag was a Section 8 company from 1994 to 2003.
 - Sonag and its owner are accused of establishing 3 companies after they no longer qualified for the Sec. 8 program that falsely obtained status as either a Section 8 contractor or a SDVOSB company.

Key Take-Aways

- Importance of Internal Investigations
- Importance of Compliance Programs

Internal Investigations

- DOJ Guidelines for Corporate Prosecutions
 - Emphasis on company's cooperation.
 - In order to cooperate, company **must** conduct an internal investigation.
 - In order to maintain the confidentiality of that investigation, internal investigations should be directed by an attorney to protect attorney-client privilege.

Internal Investigations

- When to conduct (in response to)
 - Government investigations or enforcement action.
 - Actual or credible allegations of wrongdoing committed by the company or its agent; or
 - A lawsuit against the company or one of its agents.
- Initiate as soon as triggering event occurs.

Internal Investigations

- When to use In-house or Outside Counsel
 - In-house counsel must be protected by and able to maintain the attorney client privilege and work product protection.
 - Did in-house attorney play a role in the underlying activity at issue?
 - Have the line between business advice and legal advice been blurred?
 - Can in-house counsel maintain a complete objectivity?

Internal Investigations

- In-house counsel must be protected by and able to maintain the attorney client privilege and work product protection.
 - Did in-house attorney play a role in the underlying activity at issue?
 - Have the line between business advice and legal advice been blurred?
 - Can in-house counsel maintain a complete objectivity?
 - Does in-house counsel know laws and have investigatory skills?

Attorney client privilege and work product protection.

- Engage Counsel
- Train management and employees how to protect
- Track and document whether and when litigation is anticipated
- Ensure counsel retain and supervise consultants (third-parties)
- Consider dual-track investigations
- Identify non-legal privileges.

Attorney client privilege and work product protection - Dual Track Investigation

- One team conducts an ordinary course of business, non-privileged investigation and another provides the organization with legal advice that protects the organizations interests in litigation.
- The two teams should not communicate with one another about the attorney-directed investigation

Attorney client privilege and work product protection - Dual Track Investigation

- 2013 Target data breach:
- Counsel engaged Verizon Business Network Services to conduct technical investigation to “enable counsel to provide legal advice to Target, including legal advice in anticipation of litigation and regulatory inquiries”
- Another Verizon team conducted a separate investigation into the data breach on behalf of credit card brands.
- The two teams did not communicate with one another about the attorney-directed investigation.

Attorney client privilege in tax matters

- Tax Matters: Attorney Client Privilege or §7525 Privilege
- §7525 has significant limitations:
 - Applies to only noncriminal tax proceedings
 - Applies only to “tax advice”
- Attorney Client Privilege is much broader and affords greater protection.

Compliance Programs

- Create a business case for compliance program
- Appoint a chief compliance officer
- Coordinate internal resources
- Conduct an internal risk assessment
- Implement core elements of an effective compliance program

Compliance Programs

- Elements of effective compliance programs
 - Strong organizational leadership
 - Standards and Procedures
 - Training
 - Internal reporting mechanism
 - Investigate complaints of violations
 - Due diligence and oversight of third party relationships
 - Ongoing risk assessments and auditing