

Never Hearing “I Told You So”

Best Practices for Preparing For and Responding to a Federal Investigation

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Agenda: Lessons From The Front Lines

1. How to respond to a federal investigation
2. How to prepare for a government investigation
3. What does this have to do with compliance?



To Fight or Not to Fight -- The Dilemma of a Federal Investigation

- “War [or fighting a federal investigation] is an ugly thing, but not the ugliest of things. The decayed and degraded state of moral and patriotic feeling which thinks that nothing is worth a war, is worse.”

-John Stuart Mill

- “He who fights and runs away will live to fight another day.”

-Demosthenes, Tacitus, Oliver Goldsmith



The *Dark Truth* of Federal Liability – Are We Guilty?

- Standards of Corporate/Entity Liability
 1. **Cumulative knowledge** will be considered
 - “made false statement knowing it to be false”
 2. **Act of ANY Single employee/agent** is enough if
 - Within scope of employment
 - Intended, at least in part, to benefit corporation
 - Contrary corporate policies will not absolve criminal liability



Other Dark Truths of Federal Investigations

- The Myth of the Grand Jury
 - They didn’t ask for your documents
 - They aren’t waiting for your documents
 - They aren’t trying to “decide” about guilt
 - The GJ Subpoena -- “Give us 30 seconds and we’ll change your life.”



AJ 110 (Rev. 4/07) Subpoena to Testify Before Grand Jury

United States District Court
CENTRAL DISTRICT OF CALIFORNIA

TO: CUSTODIAN OF RECORDS
XYZ Company

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:
 PERSON DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE
United States Courthouse
312 N. Spring St.
Los Angeles, CA 90012

Courtroom
8110**
DATE AND TIME
October 31, 2018
8:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any and all documents related to sales and marketing of all products and services for 2008-18.
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK (By) Deputy Clerk Jimmy Stewart, Clerk of the Court	DATE October 24, 2018
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So,

- My company IS guilty...
- Our compliance program failed (at least one time)...
- It may be crazy to fight...
- The federal agents and prosecutors have already made up their minds...
- The grand jury is just eating donuts until a ham sandwich (probably us) arrives..., and
- Everyone always blames the compliance officer.

Now what can/do we do?

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The Divine Purpose of Compliance



“This is grain, which any fool can eat, but for which the Lord intended a more divine means of consumption. Let us give praise to our maker and glory to his bounty by learning about... BEER.”

Friar Tuck, Robin Hood – Prince of Thieves

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The Divine Purpose of Compliance

- A “Mad Lib” – This is COMPLIANCE, which any _____ can _____, but for which the Lord intended a more divine PURPOSE ... SAVING OUR _____!

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Remembering Our Roots – The Federal Sentencing Guidelines
(USSG §8B2.1) and DOJ Memos

The Government says compliance efforts are a key factor in:

- Deciding whether to take regulatory action
- Deciding whether to intervene in a false claims action
- Deciding an appropriate corporate sentence, AND
- Deciding WHETHER to charge a corporation

THIS is the higher purpose of a compliance program!!!



Some Divine Truths of Compliance

- “The True Test of Character (and a Compliance Program) is adversity.”
 - No one really knows (or cares) how a Compliance Program performs *until something goes wrong.*
- Your efforts to design, implement and enforce will be analyzed in hindsight.
- “Beauty is in the eye of the beholder,” so know who is beholding you.



Our Three Central Tenets of Preparation Through Compliance

1. GO “BIG”
2. Establish “Bottom-Up” Culture
3. Follow the Checklists



Prosecution of Business Entities – what factors the government considers:

1. Nature, seriousness and duration of the conduct
2. Level of management involvement in the wrongdoing
3. Pervasiveness of this wrongdoing
4. Any history of similar conduct
5. Any remedial action already taken
6. Compliance efforts – adequacy of program
7. Corporation's timely and voluntary disclosure of wrongdoing
8. Corporation's willingness to cooperate in the investigation



Responding=Preparing -- It is NEVER Too Late To:

1. Investigate
 - get ahead of the government;
 - Find a factual/legal defense;
2. Take Corrective Action;
3. Fix compliance issues;
4. Implement new compliance measures (or a program);
5. Document what you've done;
6. Prepare for document/discovery issues;
7. Prepare for a search warrant or witness interviews;
8. Make disclosures;
9. Cooperate (What does that really mean???);
10. Prepare for parallel civil litigation.



Some Nuts and Bolts of Responding

- Fix what you can NOW, so it can be discussed.
- Get everything under the umbrella.
- Where appropriate, invoke the A/C privilege. NOW.
- Document holds: don't wait.
- Search warrants are like life insurance – you have to discuss.
- Identify the players.
- Let counsel handle communications with the government.



Some Nuts and Bolts of Preparing

- Define the Compliance Umbrella;
- Have an investigative process, and document everything;
- Routinely analyze whether to invoke privilege.
- Routinely analyze mandatory disclosure obligations or option;
- Monitor litigation, subpoenas, risk areas, and communicate;
- Implement and monitor document retention policies;
- Enforce policies and discipline;
- Follow the compliance checklists;
- If you don't have "sufficient resources and authority," do something now;
- Have a schedule – if you don't have time for something, schedule it.



Some Nuts and Bolts of Handling Mandatory Disclosable Events

- Ensure thorough investigation and fact finding first;
- If appropriate, prepare comprehensive disclosures that answer all the questions the government may consider;
- Address root cause of the events;
- Address "present responsibility" concerns;
- Engage with lead agency and mitigate risk of debarment/exclusion



Search Warrant Protocol

- Advance Preparation for Search Warrant
 - Distribute *Privileged* Search Warrant Protocol to Key Personnel
 - Advise Employees of Rights if Interviewed Requested
 - Protect Privileged Documents
- Response to Search Warrant
 - Immediately call legal counsel
 - Let employees go home if possible
 - Do not interfere with search, but observe, take notes if possible
 - Do not give formal "consent" to search (without consulting with counsel)



DOJ's Revised FCPA Corporate Enforcement Policy

- DOJ has codified the 2016 FCPA pilot program
- Under new policy, there is a "presumption" of a declination for companies that voluntarily disclose suspected non-compliance, cooperate with the government in the investigation, and remediate
- Remediation includes implementing an effective compliance program

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Questions?

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