

## *Six critical strategies for a company under investigation*

"My company will never come under investigation: we're too small and we are squeaky clean."

Unfortunately, neither of these attributes will save you from being investigated. In 2009, for a variety of reasons, more and more businesses in Oregon and across the nation will become susceptible to investigations than at any other time in history.

This means that it is the foolhardy business that does not formulate plans for the day it does come under investigation. Just because your company has done nothing wrong does not insulate you from being investigated.

How will you find out if your company is under investigation? There are several ways. The government could come at you directly or indirectly.

In years past, that notification would typically come in the form of a letter informing you that your company is under investigation, or the issuance of a grand jury subpoena seeking documents related to the matter under investigation.

No more. Prosecutors and agents will frequently obtain search warrants and asset seizure warrants to "surprise" you with an investigation. Or, potentially more disastrous, they may contact you last after their investigation has been underway for several months or years. Meanwhile, they have contacted your customers, vendors and bankers, which can have a devastating effect on your company's goodwill and standing in the community.

Regardless of the nature of the investigation (tax, accounting fraud, environmental, etc.), there are several common but critical steps to take once you find out the government has started an investigation.

**Reach out to the investigators or prosecutors immediately.** Assuming you are contacted by the government by a letter, subpoena or you get wind of the investigation through a friend or business contact, it is imperative to contact the agents and prosecutors immediately. The better practice is to have your in-house or outside legal counsel make the contact.

If you or any other employee makes the contact, it could be troublesome. The prosecutor or agent may strike up a conversation with you or the employee, which often results in the employee making false admissions or statements that come back to haunt the company later as it tries to close down the investigation.

The purpose behind the contact is two-fold: First, get the government to tell you the nature



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of the investigation, you or your company's status in the investigation (target, subject or witness); second, make it clear to the government that you are happy to comply with any requests for documents that they may issue. Essentially, the government has broad powers to get any documents that are not privileged.

Your cooperation in providing those non-privileged documents minimizes the risk they will hit you with a search warrant or pester your vendors or customers for the documents.

**Halt normal document production and start retaining records.** Storing hard copy documents and electronic media is a costly and time-consuming process. Not surprisingly, many companies have adopted reasonable and prudent policies to periodically destroy documents or purge electronic media. Those practices must be modified once you determine the existence and nature of the investigation.

Again, there are at least two good reasons for this: One, you and the government will want these documents to determine the validity of the matter under investigation, and two, suspending normal destruction policies minimizes the chance that the government will cause further headaches by accusing you of impeding or obstructing their investigation by not retaining relevant documents.

**Notify the board of directors.** Anytime a government agency opens an investigation that could result in some administrative, civil or even criminal sanction against the company and its officers, it is imperative that the board be convened and notified of the investigation. The board must then appoint a sub-committee to direct the company's action and response to the investigation.

**Consider reaching out to your vendors and customers.** This requirement is not an absolute — it depends on the situation. If the government has told you that the investigation is still confidential and no third parties have yet been contacted, you may not need to notify your vendors or customers.

However, if the investigation is public or the government indicates they will contact your customers, then you may want to "get ahead of the issue" by speaking to your customers and vendors

directly. (Of course, if you are a publicly-traded company there is a whole host of issues to consider in what to disclose to the marketplace and regulators and.)

**Conduct an internal investigation of the matter.** Prosecutors and agents fully understand that no company can ever guarantee that it won't hire a rogue and dishonest employee, and the government knows you can never guarantee that every person or business that you collaborated with will not cross the line.

However, what does get their ire and makes life harder for you is if you or your company don't take notice and react to the allegations made by the government. For this reason, that special committee of the board needs to conduct an internal investigation.

The better practice is to let outside professionals conduct the investigation, as investigations conducted by employees of the company under investigation lack (at least in most prosecutors' minds) objectivity. The investigation not only benefits your company in that it shows the government you take the matter seriously, it also is necessary for the company to determine on its own the validity of the allegations and the scope of the wrongdoing.

A thorough and objective internal investigation that finds no substantiation allows you to legitimately urge the government to drop the investigation. An internal investigation that uncovers wrongdoing and the scope of the wrongdoing — while not the best news in the world — allows the company to realistically assess its exposure to sanctions by the government.

**Notify your insurance carrier.** Most crimes against your company will be committed by insiders — theft or accounting fraud. Your professional fees in investigating these crimes and dealing with the government, and your ability to recoup any losses from the crimes, are often covered by your insurance policies. Thus, it is very important to give timely notice to the broker or carrier once you know of the suspected wrongdoing.

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