International Law Office White Collar Crime - USA

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In the United States, the term "white collar crime" is used to refer to all acts which are declared criminal by regulatory laws and all large scale frauds. Until the end of the 19th century, the U.S. was almost entirely a common law jurisdiction in regards to the definition and prosecution of crimes. Most of the conduct that we would today consider "white collar crime" was then regarded as a part of normal commercial activity.

The first U.S. laws which regulated and punished commercial conduct by large corporations were the so-called "anti-trust laws" of the 1890's. These statutes attempted to curb the excesses of the "robber barons" who were viewed as having abused their economic powers in order to create monopolies in important national industries, such as railroads, steel, oil and finance. The "anti-trust laws" of the 1890's were part of a populist movement which sought greater protection and economic justice for farmers and factory hands, while expressing the belief that free competition between small businesses provided a general benefit to society. There was a strong feeling in the populist movement that those who sought to stifle competition were, in some cases, causing social hardship sufficient to mark them as criminals. There were early prosecutions of companies under the "anti-trust" laws and corporate leaders were vilified, but there was no serious attempt at that time to send individual businessmen to jail.

The "anti-trust" laws were followed by two decades of legislation designed to protect the purity of food and drugs, assure minimum standards for wages and workplace conditions, and protect the retail trading system. Many of these statutes were enacted by state governments, rather than the national Congress, and, while some carried financial penalties, they did not result in any serious attempt to place businessmen in jail or to declare them "criminals".

The Great Depression of the 1930's brought a new wave of class conflict to the U.S. and renewed calls for tough regulation of the principal engines of commerce. It was widely believed in the 1930's, as it had been 40 years earlier at the time of the "robber barons", that the economy was in the hands of crooks and scoundrels who were manipulating it for their own profit and to the great harm of the majority of the population. Wide-ranging laws were enacted, this time by the national Congress, to restructure the banking, securities, transportation, farming, railroad, and insurance industries and granting new protections to the less affluent segments of society. Many of these laws for the first time imposed serious criminal penalties on economic activities which had previously been

regarded by law as part of the rough and tumble of daily commerce. Fraudulent promotion of securities, use of insider information to trade securities, engaging in wide-spread frauds in the marketplace, use of underage labor or exceeding a limited work week, fixing prices, and combining the sale of several types of financial services in one company, all were now declared to be crimes which could be investigated and prosecuted by new federal agencies based in Washington, DC.

World War II intervened, and the financial and industrial forces which had been separated by law in the 1930's were recombined and forged into an even more efficient machine as part of the effort to win the War. In the late 1940's, a newly strengthened labor force demanded more legal protection. But most other populist concerns of the 1890's and 1930's were soon forgotten as the American economy enjoyed a post-War boom that seemed to bring economic benefits to many of the groups which had felt left behind before. Few in this period had an interest in reining in the businessmen who appeared to be delivering prosperity to the country, and the regulatory agencies created in the 1930's quickly ossified in arcane regulations and became captives of the industries they had been created to control. No one gave serious thought at this time to declaring that a person was a criminal who merely engaged in unsavory business practices. The sole exception was, of course, tax fraud, but even this presented a threat of imprisonment only to persons who were known to be violent criminals. For others, the penalty was most often merely a fine.

The late 1960's and early 1970's brought a new and deeper questioning of the basis of American economic and political institutions. The naïve idealism of a new generation ran up against the entrenched forces of racism, the military-industrial complex, corporate pay-offs to politicians, and a deep economic recession. This resulted in new calls for social justice, including a demand that tighter legal controls be placed on the forces that seemed to control the country and, in particular, the economic and political institutions which seemed again to be operating without restraint. Many began to ask why a person who stole $10,000 should be treated differently because he used a pen rather than a crowbar to commit the crime, and it was believed that the deterrent effect of a possible criminal penalty would be even greater on an affluent businessman than on a petty thief. Legislatures started adding criminal penalties to virtually every regulatory statute they passed, and prosecuting attorneys began to enforce these new crimes first against corporations, and later against the executives who ran those corporations, when they polluted the environment, defrauded the consumer, traded on insider information, fixed prices, or committed a multitude of other acts of commercial fraud, corruption, and self-dealing. In the 1970's, 1980's and 1990's, the movement to charge business executives and their companies as criminals and to subject them to fines and imprisonment spread, expanding from the anti-trust and stock swindling activities that had been the subject of concern in the 1890's and 1930's to new areas of environmental and Internet crime and now, even to acts against the U.S. economy which are committed outside the United States. This movement has how spread to almost every local, state and federal prosecutor in the U.S.

The U.S. Criminal Justice System

1. The Federal System

The U.S. actually has two, often competing, criminal justice systems. The

national, or federal, government operates a system that enforces all criminal laws enacted by Congress. That system has at its base over 40 different criminal investigative agencies, reporting to several different Cabinet secretaries, each with its own special subject matter jurisdiction. The foremost and best-known of these is the Federal Bureau of Investigation (FBI), which has responsibility for investigating some of the highest priority crimes, including corruption, organized crime, terrorism, theft of trade secrets and fraud on the Government. The FBI is part of the Department of Justice, which is headed by the U.S. Attorney General and also includes all the federal prosecuting attorneys. As a general rule, any matter under investigation by the FBI is a high priority matter for the U.S. Government and will be able to command the attention of prosecuting attorneys in federal courts around the country.

Other important federal investigative agencies are: the Drug Enforcement Administration (DEA), which is also located within the Department of Justice and is responsible for all matters relating to illegal trade in drugs; the Internal Revenue Service (IRS), which is located in the Treasury Department and is responsible for investigations of tax fraud and money laundering; the Secret Service, also within the Treasury Department and responsible for investigating credit card fraud and counterfeiting; the Customs Service, located in the Treasury Department and responsible for interdicting smuggling; the Bureau of Alcohol, Tobacco and Firearms (ATF), located in the Treasury Department and principally responsible for investigating crimes involving illegal weapons; and the Postal Service. an independent agency which is chiefly engaged in investigating mail fraud. In addition, each of the federal agencies has its own internal investigating arm to audit and detect misconduct by its own employees and fraud in the programs it administers. Thus, the Department of Health and Human Services includes an Inspector General's Office which investigates fraud by health care providers, suppliers and payors relating to the national health care insurance program for the poor and elderly. And the Defense Department has an

internal investigative unit to uncover fraud by military contractors. Finally, independent regulatory agencies, like the Securities and Exchange Commission (SEC) and the Environmental Protection Agency (EPA), employ their own criminal investigators to look for evidence of violations of the criminal statutes they enforce.

No single U.S. Government officer oversees all or even a majority of these federal law enforcement agencies. Each agency works subject to its own priorities and decides for itself which cases it wants to investigate and what position it wants to take on the proper interpretation of its statutes.

After the federal investigative agencies have decided what cases they wish to investigate, they seek the assistance of the federal prosecuting attorneys. These are organized under United States Attorneys, each of whom is appointed by the President and located in one of the 93 federal judicial districts. The U.S. Attorneys supervise several thousand Assistant U.S. Attorneys and related professionals, who work with the federal investigative agencies to prepare and prosecute criminal cases in United States courts. The U.S. Attorneys report to the Attorney General of the United States. Thus, while the over 40 federal investigative agencies set their own priorities and are not subject to the control by any one Government department, they cannot take their cases to court without the assistance and approval of the U.S. Department of Justice, acting through its U.S. Attorneys and their assistants. The place for a defense attorney to go, therefore, when she or he believes that a client is being investigated in connection with white collar crime is the U.S. Attorney's Office where the matter is likely to be prosecuted.

2. The State Systems

Each of the 50 states also operates its own criminal justice system which may, from time to time, coordinate activities with the federal agencies or prosecutors, but which, for the most part, acts entirely independently of the federal system.

State legislatures can only impose sanctions for conduct that takes place within the borders of their states, but they are free to define as crimes anything they think appropriate so long as the activity is not protected by the federal or state constitutions or is in a field that has been pre-empted by some over-arching federal regulatory scheme. With these general limitations, the states are free to impose criminal penalties on any conduct they like, without regard to whether any other state or the federal government does the same. Under the "Two Sovereigns Doctrine", the states and the federal governments are separate independent entities for the purposes of defining and punishing crimes and a person may be made to answer to both sovereigns separately for the same acts. Since many of the white collar crimes prosecuted in the U.S. are prohibited by both the federal and the state statutes, it is therefore not sufficient to settle with one sovereign only when faced with a potential prosecution.

The states have created many different criminal justice systems, but in the main they are all characterized by local (usually county and city-wide) police and prosecutors, who only rarely handle white collar crime cases; state police and attorneys general, who may or may not handle white collar crime cases; and, in the more populous states, independent agencies with their own investigators and prosecutors, who will handle specific types of white collar crime matters (such as fraud in the sale of securities or insurance). Generally speaking, the state systems are more hierarchical than the federal system, and local police and prosecutors will often answer and even take direction from state police and state attorneys general. When a defense attorney believes his or her client is being investigated for violation of state white collar crime laws, it is often best to approach the highest officer in the state with responsibility for the case.

3. The Grand Jury

One significant difference between the federal and state criminal justice systems is the role played by the grand jury. A grand jury is a body of 23 citizens, called to sit in secret under the supervision of a court to hear evidence presented by a

prosecuting attorney with the aid of criminal investigators and to decide whether someone should be charged with a crime. If the grand jury agrees that a person should be charged, it will return an indictment and the person will then be arrested and required to answer the charge of the indictment, usually by standing trial. The grand jury works in secret and, as a matter of law, has the power in most parts of the U.S. to determine what it will investigate and how it will do so. However, as a matter of practice, the grand jury is usually content to be guided by the prosecutor who has called it and most often returns the indictments that the prosecutor requests. The difference between the state and federal grand juries is that state grand juries usually do very little and sit only long enough to hear the cases which have already been fully investigated by the police and to agree to charge the persons who the police and prosecutors have concluded are guilty of the crimes. But in the federal system, the grand jury sits for 18 months or more, hears testimony of witnesses, examines documents and other physical evidence, and issues subpoenas for further evidence to be brought before it. The grand jury is therefore a powerful investigative tool in the federal system.

The Court System

Just as there are two criminal law enforcement systems, one for the federal government and another for the states, there are also two court systems to hear those criminal cases once they are brought. The federal court system is made up of judges appointed by the President for life. The U.S. District Courts are the trial courts; the Courts of Appeal (sometimes referred to as Circuit Courts) are the intermediate appellate courts; and the Supreme Court is the highest federal appellate court. The District Courts sit in each of the federal judicial districts, usually in the same building in which the U.S. Attorney has his or her office. The Courts of Appeal sit in principal regional cities and hear appeals from District Courts in their areas. The Supreme Court sits in Washington, DC and hears appeals from the Circuit Courts. (There are also special subject matter federal courts, such as the Tax Court and the Court of Claims, but they have little, if any, role in white collar crime enforcement.)

The state court systems are similarly structured, usually with a general trial court called a Superior or County Court to hear all major trials, an intermediate level appellate court called the Appeals Court, the Appellate Division or some similar title, and a high court, usually referred to as the Supreme Court, but sometimes the Appeals Court, the Law Court or the Supreme Judicial Court. All criminal trials in the U.S. may, at the defendant's election, be tried to a jury. Appeals in both state and

federal courts are on issues of law only, and, where there is an intermediate appellate court, only cases of the highest import are reviewed by the Supreme Court. When a case has reached the state's highest court, it may go on to the U.S. Supreme Court only if it raises an issue of federal law sufficiently important for the U.S. Supreme Court to agree to hear it.

Special Issues Unique to U.S. White Collar Crime Prosecutions

Investigation and prosecution of crime in the U.S. is limited by constitutional and statutory restrictions and is influenced by some unique procedures, the principal of which are as follows:

1. Miranda Warnings: Neither the state nor the federal government may conduct a "custodial interrogation" relating to a crime (i.e., questioning where the suspect is not free to leave or reasonably believes he or she is not free to leave) without first warning the person of his or her rights not to talk and to have an attorney present during questioning.

2. Search and Seizure: Neither the state nor the federal government may use its own agents to search any premises in which a person has a reasonable expectation of privacy without obtaining either the permission of the person controlling the premises or a warrant from a neutral and detached magistrate, upon a showing of third party evidence to support a belief that the area contains evidence of a crime or contraband.

3. Wiretaps and Similar Interceptions: The rules for state and federal wiretaps are different, but the overriding principle is the same for each: the government may not tap into a private communication by wire or other means without first obtaining an order from a judge, based on a showing that there is reason to believe that evidence of criminal activity will be obtained, and then only subject to rules designed to protect the legitimate and privileged parts of such communications.

4. The Exclusionary Rule: For over 30 years, state and federal courts in the U.S. have excluded from any criminal proceeding evidence that was obtained in violation of the defendant's constitutional or statutory rights, including in violation of the procedures outlined above. The Courts have made the policy decision that

it is better to let a guilty person remain unpunished than to let the police have license to violate people's rights.

5. Attorney-Client Privilege: In both the state and federal systems, the communications between an attorney and a person who consults her or him for legal advice are absolutely privileged and cannot be inquired into by the criminal authorities or the court. The privilege does not protect efforts by a lawyer to help his or her client plan a future crime.

6. Joint Defense Agreements: Two or more people who have similar interests in defending against a state or federal criminal investigation may agree to share information about their conduct and the investigation without thereby waiving their right to keep that information confidential between themselves and their attorneys. In white collar crime cases in particular, this ability of several witnesses to share information about the investigation can be very helpful to the defense.

7. Sentencing Guidelines: In the federal system only, sentencing for conviction of a crime is determined by a formula prescribed by the federal Sentencing Guidelines. These are intended to assure that the same conduct receives the same sentence based on the same considerations in every federal court across the country. The federal Sentencing Guidelines generally require jail time for white collar crimes.

8.The Importance of Agency Regulations: In the U.S., the law that applies to a person's conduct in a regulated industry consists of statutes, court decisions and agency regulations. Usually the regulations constitute the largest and most complete statement of a regulatory agency's views on the laws it enforces, and it is not possible to determine a person's exposure to white collar criminal prosecution until those regulations have been consulted.

9.Prosecution Guidelines: The U.S. Department of Justice and some of the largest state prosecutors' offices publish guidelines for determining the kinds of

cases they will accept for prosecution and how they will handle those cases. The Department of Justice guidelines are published in the U.S. Attorneys' Manual.

10.Corporate Liability for Acts of Directors, Officers and Employees: Both a corporation and its individual directors, officers and employees can be charged with violations of white collar crime statutes. The decision whether to prosecute the company or its director, officer, or employee or both will often turn on who had control over the prohibited conduct and who is most cooperative with the government during the investigation. U.S. law recognizes the doctrine of "collective knowledge" which holds that a corporation can be charged with a crime based on the fact that all its directors, officers and employees together had the requisite knowledge to make out the elements of the crime, even if no one person had such knowledge. Conversely, U.S. law allows a corporation to be charged for the acts of a single director, officer or employee.

Conclusion

In the US, white collar crime is now a high priority for both state and federal prosecutors. When confronting a case of white collar crime, either as a subject of the investigation or as a victim of a crime, it is important to understand how the system is structured, what rules apply, and which offices should be approached for assistance.

Richard Wiebusch
richard.wiebusch@haledorr.com

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