

When the Government Knocks

Think the government will never investigate your business because it is “clean”? Think again.

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A wide variety of events can trigger an investigation: an industrial accident, product contamination, competitor and consumer complaints, exporting hi-tech products, payments from third parties, embezzlement, investor and lender complaints, restatement, environmental hazards, permit, licensing and regulatory inspections and, of course that old standby, the tax audit. (Keep in mind that two-thirds of all tax whistleblowers are former spouses or business partners).

So, what do you do when you get that call or subpoena from a government agency?

First, suppress the notion that you can make it go away by just sitting down with the government agents and explaining everything. This never works. Why? Because it is the agents' nature to be cynical and assume you've done something wrong. Also, government agents do not operate in the realistic business world. They will not understand your explanation. There may be a time and place to sit down with the prosecutor, but only after you are adequately represented and your counsel has thoroughly investigated and developed a strategy.

Second, **STAY OFF THE EMAIL**. The first thing the agents look at when they search for documents are the email messages of the key people in the business. A flip or impulsive remark about the investigation can convict you. Just ask Frank Quattrone or anyone at Arthur Andersen.

Third, gather together your "team" for dealing with the investigation. This team must include your: inside counsel, outside counsel, CEO, CFO, IT head, Security, and, depending on the problem, it will also probably include: Human Resources, Press Relations, Governmental Affairs, Investor Relations, Audit Committee, and your insurance

broker. Make sure all communications include your outside counsel. This will preserve the confidentiality of the communications because of the attorney-client privilege.

Fourth, notify all relevant employees to preserve all of their documents and have outside counsel gather all documents and electronic data. Although many companies use their own IT personnel to do this, it is advisable to use an outside firm so that there is no accusation of data corruption or destruction.

Fifth, have the Board of Directors issue a resolution instructing full cooperation with the government, authorizing outside counsel, addressing the issue of indemnification and defense for employees and officers and establishing a procedure for direct reporting of the investigation's status to the Board. Remember, the way the company responds to the investigation will go a long way in determining whether, or how severely, the government will prosecute the company.

Sixth, look for collateral attacks. Don't just focus on the criminal investigation. The damage to the corporation from a criminal conviction is actually often less than from the accompanying civil lawsuits and even regulatory actions. For instance, a defense contractor would at worst pay a fine in a criminal case, but would likely be debarred from any government contract work. Choose counsel who has experience in all of these areas so that your defense will be seamless.

Lastly, budget for the long haul. Investigations can often take years to resolve and there is little you or your attorney can do to speed the process. Be responsive, be smart, and then get on with your business.