

Basic Guidelines for a White Collar Criminal Investigation
(An Informal Test for Executives)
By Jonathan Goodman, Esq.¹

For you business executives who assume that you know how to handle a federal criminal white collar investigation, try this exercise and see how you do:

- You're the CEO of a mid-cap public company. While driving to work one morning, you receive a phone call from your in-house general counsel. She's on a conference call with the supervisor of the company's accounting department. You learn the following.
 1. The accounting supervisor received a visit that morning at 6:45 from two (it's usually two — they travel in pairs) FBI agents. The accounting supervisor says he told the FBI agents "nothing, absolutely nothing." He also admits, under gentle questioning from you, that the ambush interview at his home lasted "almost two hours." Hmmmmn.
 2. The accounting supervisor also turned over his company-issued laptop computer to the two FBI agents because he assumed "the FBI would be suspicious if I turned down their request for my computer." Hmmmmn (again).
 3. During the almost two-hour interview in which "nothing" was revealed, the FBI agents questioned the accounting supervisor about a lucrative government contract which your company has had for almost five years. They also questioned him about your company's "restated" financial statements, and they hone in on certain transactions which are informally known in your company as "round-trips." (Suddenly that term doesn't sound so great).
 4. After speaking to your accounting department supervisor, the FBI agents leave a grand jury subpoena with him. As best as you can tell, the subpoena basically asks for all relevant financial and accounting information for the past seven years.
 5. At this point, your general counsel asks the accounting manager to hang up, and you speak privately with your general counsel. Together you telephone the company's loss prevention, security/investigation department supervisor, a retired DEA agent from Queens. After hearing what has happened, he says he suspects that the accounts receivable clerk who was recently placed on probation for violation of the

¹ Reprinted with permission from the Daily Business Review.

company's substance abuse policy is the "snitch" who has been "feeding stories" to the FBI.

- The following strategic decisions are made (with an analysis immediately following each decision):

1. Your general counsel tells you that the company should immediately contact its outside corporate counsel to conduct a full investigation of the government contract and the so-called "round-trip" transactions. After all, she explains, this outside law firm is already familiar with the restated financial statements (because it was involved in the process two years ago). She tells you that using the company's "regular" outside law firm would be efficient and would generate a cost savings.

Analysis: This is probably a huge mistake. Asking the law firm to be the investigator may generate some short-term savings but it is risky because the law firm would, in effect, be investigating its own conduct. Perhaps the law firm would do a masterful and objective job of investigating the allegations. Perhaps not. Either way, it would look terrible and government prosecutors and investigators would be extremely skeptical.

2. You suggest that the company immediately terminate the accounts receivable clerk. You conclude that the company has ample grounds to fire him because of his previous violation of the company's substance abuse policy. You believe that terminating this employee is necessary before he tells more false stories to the FBI.

Analysis: You may have an MBA from Harvard Business School but you lack some basic common sense. Terminating this employee may well backfire on you. First, you are certainly not sure that the employee did, in fact, provide information and/or documents to the FBI. Second, if the employee is the informant, then he will probably be viewed as a "whistle-blower," and is entitled to statutory protection. Thus, the employee may have been tooting some coke two or three months ago, but you already decided that this was insufficient to terminate him at the time. The government — and the jury, or multiple juries — will view this employment decision in an extremely negative way.

3. Your retired DEA agent forcefully insists that all employees be told to "shut the hell up." He reminds you that many criminal prosecutions are based on confessions, admissions and knee-jerk statements given by company executives and employees. He suggests that a firm-wide email be distributed, advising all employees to not answer questions from the FBI and to contact the legal department in the event that an FBI special agent makes contact with them.

Analysis: You're batting zero for three here. Superficially, it may make sense to shut down the information-gathering process and prevent your employees from making misguided, uninformed and uncounseled statements to the FBI. But the FBI and federal prosecutors will probably view these directives as obstruction of justice, which is in and of itself a crime.

4. Remembering a presentation you attended at a white collar crime symposium for corporate executives, you decide to issue an email to all employees, urging them to not destroy any documents. You pat yourself on the back for remembering this, and for acting on it.

Analysis: Don't be too quick to congratulate yourself. Unless you also advised your MIS or IT department to immediately stop the automatic process of purging and discarding old emails, downloaded emails, storage disks, etc., you may not have gone far enough. Many companies have email systems where old emails are temporarily stored on disks, kept for some period of time (e.g., two years) and then discarded. You do not want the prosecutor and FBI determining whether the continued discarding of disks containing three-year-old emails was routine or an intentional effort to destroy potentially relevant evidence in the midst of a criminal investigation.

5. In addition to asking outside general counsel to conduct an "independent" investigation, you also contact two or three experienced litigation lawyers (who periodically handle commercial litigation for the company on an hourly basis) to represent the top management executives.

Analysis: Unless these litigation lawyers, experienced as they may well be, have direct experience in criminal cases, they may not be the right lawyers to be representing your top managers in a criminal investigation.

6. You remember an article you read about "joint defense agreements" while returning from your last business trip. You instruct your general counsel to obtain a standard joint defense agreement and to have it signed by the lawyers who will become involved in this case. Your general counsel hops on the internet and downloads a "sample" joint defense agreement which has been circulating for the past two to three years.

Analysis: Criminal defense lawyers may debate the wisdom of reducing joint defense agreements to writing, but using an outdated joint defense agreement may be problematic. The agreement should

specifically discuss what happens at trial – and whether participants can or cannot be cross-examined with information obtained solely from information exchanged as part of the joint defense agreement. Failure to adequately resolve this issue may lead to a motion for disqualification and some tough questions from the judge and prosecutor.

7. Recognizing that the government views the company as a target and appreciating that the government probably interviewed other witnesses before visiting with your accounting department supervisor, you correctly assume that the government has issued other grand jury subpoenas and has obtained information from other witnesses. In a legitimate effort to find out more information, you contact the CFO of one of your largest customers and ask him whether his company has been contacted by the FBI. He willingly tells you "yes," and volunteers that he is scheduled to appear before the grand jury in 10 days. He also says that he is expected to produce documents a few days before his grand jury appearance. You ask to meet with him in a few days to review the contract and other documents he will be producing and to generally discuss the business relationship between your two companies.

Analysis: Again, these may seem to be perfectly logical and understandable steps — but the government may well view this as obstruction of justice. Combined with the earlier effort to direct employees to not answer questions, this development will not put you at the top of the prosecutor's "good corporate citizen" list.

So, how did you do? Don't be frustrated if you made some of the same decisions as the hypothetical CEO. The point is to be aware that there are issues — and to speak with someone who can help you through the process.