Criminal Conduct and Corporate Liability
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Schaun D. Henry
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Some blame a general quest for the almighty dollar, others, a decline in moral fiber, but white-collar crime has been around as long as commerce itself, or at least as long as there have been white collars. The film "The Wolf of Wall Street" depicted invidious and systemic criminal conduct within a company. The term "white-collar crime" though, encompasses a wide variety of wrongdoing. While it is often viewed as a crime committed by the elite, its meaning today is probably broader than originally intended. The moniker is used largely to separate white-collar crime from what is considered common street crime.

Webster's New International Dictionary defines white-collar as:
"Belonging or related to a population segment or class made up of salaried employees (as teachers, salespersons, office workers, civil servants) whose duties permit the wearing of street clothes and call for well-groomed appearance."

Black's Law Dictionary defines white-collar crime as:
"A nonviolent crime involving cheating or dishonesty in commercial matters. Examples include fraud and embezzlement."

The FBI's website identifies white-collar crime as including the "full range of frauds committed by businesses and government professionals."

Is It Really a Big Deal?

We tend to look at white-collar crime as a lesser version of crime. Since there is often no violent aspect to it, the public at large is often less than interested. In the era of "if it bleeds, it leads," white-collar crime often takes a back seat. I have personal experience of a client having reported embezzlement of more than $500,000 by one of its executives only to receive a less than enthusiastic response from local law enforcement. Imagine the scenario where one or more of your employees compromises your hard-earned business reputation through criminal action, possibly subjecting you and your business to criminal prosecution.

When one considers that well-known Wall Street scandals including Bernie Madoff, Enron and others literally created tens of thousands of victims, the gravity of such crimes becomes more apparent. White-collar crime may involve federal or state prosecution and in some cases may include both. While most crimes are state-related matters and many states have laws on the books proscribing white-collar crime, the federal government's involvement in white-collar crime is substantial. Still, white-collar crime can be difficult to identify and neutralize. The Madoff scheme continued for 36 years without any real interference.

Many white-collar criminal matters are extremely complex, involving schemes that cross state borders. Once the perpetrators are in the stream of interstate commerce, they may be subject to federal jurisdiction under the commerce clause of the U.S. Constitution. Some white-collar crimes are also so wide-ranging that only the federal government would have the resources to prosecute those responsible effectively.
Where both state and federal jurisdictions exist, and the case is based on substantially the same acts or transactions, the United States Attorneys' Manual describes the policy on dual and successive prosecution this way, where:

- "The matter must involve a substantial federal interest.
- The prior prosecution must have left that interest demonstrably unvindicated.
- The government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact."

In addition to criminal prosecution, civil liability through separate civil actions is a real possibility under many of the relevant statues. Criminal prosecutions usually take precedence in the federal system. Still, the possibility of civil suits for damages raised by victims, and in some cases government agencies, is substantial. Obviously, civil suits allow potential victims to take charge of their own claims and present their cases in the light most favorable to them. A federal prosecutor represents the U.S. public and not an individual victim. Still, if your business has been compromised by criminal actions, you will be seen as the bad guy and substantial liability may result.

**Basis for Claims**

White-collar crime prosecutions as well as civil claims may arise under multiple causes of action, including bribery, mail and wire fraud and embezzlement. Federal statutes that can result in white-collar crime prosecutions are myriad and include:

- **Sarbanes-Oxley Act**—enacted in response to high-profile accounting scandals in major corporations, the law contains 11 sections, including one that amended the federal Criminal Code to increase penalties for: (1) conspiracy to commit an offense against, or to defraud, the United States; (2) mail and wire fraud; and (3) Employee Retirement Income Security Act violations.

- **False Claims Act**—which applies to individuals and corporations who make any claim upon or against the United States or any department or agency thereof, knowing such claim is false, fictitious or fraudulent.

- **Foreign Corrupt Practices Act**—contains two main provisions. One that requires accounting transparency under the Securities Exchange Act of 1934 and the other concerning bribery of foreign officials. As you can imagine, many companies have the potential to run afoul of this particular law. In many cases, the custom of the country in which a business is operating may call for providing gifts as a show of respect. In such instances, if they are viewed as any more than de minimis, they create the risk that your company may be violating the law.

Obviously, the listing of potential causes of action above barely scratches the surface of the list of available statutes and common-law remedies.

**Betting the Company**

In general, corporations may be held criminally liable for the acts of employees. Corporate liability may require only that the company's agent acted with the requisite intent for a violation of the statute involved. In these cases, the prosecution need not prove specific intent by a particular actor. The combined knowledge of multiple employees can be enough to impute liability to a corporation in some cases.
Corporate principals, board members and the like may be able to seek coverage for defense of claims from their directors and officers' policies. Insurers will sometimes cover such costs, which can be a huge financial drain. Consider speaking to your broker about the extent of your coverage. Here are some points to keep in mind.

- **Policies.** Each company should have clear policies proscribing potentially criminal behavior, such as conflicts of interest and corporate gifts, for example. The policies should clearly point out how an employee should report expected violations. Policies should also explain that suspected violators will be investigated. As in every case, such policies must be strictly enforced. If employees believe that high-level executives regularly violate policy without consequence, you may well lose the value of your policy as a defense tool. Employees should be periodically educated on these policies. Where travel overseas is part of the job, corporate personnel should be educated on the overseas culture they are about to visit.

- **Investigation.** Many corporate entities are required to provide whistleblower-type policies, which afford employees the opportunity to complain internally about suspected fiscal wrongdoing or impropriety. Once you receive a report, what do you do next? Depending on the nature of the report, more information may be needed. If so, you may gather some limited information (preferably through records review, rather than direct interviews) to determine if a problem exists. Once you establish that there is a problem, you should immediately contact counsel for assistance. If you are going to be involved in what you believe is a potentially criminal investigation, seeking counsel would be your most important act. Further investigation will take place through counsel and may allow you to maintain some level of attorney-client privilege. How much or how little you do, in terms of investigation, is a function on the advice you receive from counsel on your particular case.

- **Reporting.** Corporations that report suspected white-collar crime violations will likely be in much better standing to obtain some form of consideration from the prosecutor. Waiting to be discovered, or worse, seeking to suppress information, is unlikely to bear fruit anyone would care to taste. Reporting wrongdoing as quickly as practical to your carrier is also likely to garner some level of positive consideration. Of course, the terms of your particular policy will rule the day. Although most policies prohibit coverage for intentional wrongdoing, in America we are still innocent until proven guilty. As a result, many carriers may pay for the cost of defense though they may not cover any resulting monetary loss through fines or restitution.

**Strong Ethical Policies**

As a corporation, you should be sure that you have strong ethical policies and that you train employees on those policies. In the event of any potentially unlawful conduct, seek counsel regarding your rights immediately. Your freedom may well be at stake. Your fiscal well being and that of all of your employees may turn on what actions you take after you learn of a potential criminal violation.

**Schaun D. Henry** practices in the labor and employment group at McNees Wallace & Nurick, an ALFA International law firm. He provides representation and counseling to employers on a wide range of labor and employment matters. Henry provides guidance for employers on unfair labor practices and other labor relations issues, as well as providing representation for employers at labor arbitrations and negotiations. He advises employers on a wide variety of employee-related issues.