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Frequently Asked Questions – Corporate Criminal Liability

1. Q. *Can a corporation be held criminally liable in the same way as an individual can be held liable?*

   A. Yes. A corporation can be prosecuted for essentially all of the same crimes as individuals and, if proven guilty beyond a reasonable doubt, convicted of felonies and misdemeanors.

2. Q. *What conduct is sufficient to create corporate criminal liability?*

   A. Any act undertaken by an agent of the corporation, within the scope of the agent's authority and for the benefit of the corporation, is sufficient to bind the corporation. The corporation need not actually benefit and the conduct may be in direct contravention of corporate policy. A single agent of the company need not perform the acts or possess the mental state necessary for the company to face criminal liability. Under the collective knowledge doctrine, the states of mind of multiple corporate agents may be aggregated to find a sufficient criminal mental state.

   The standard is broad and harsh. The decision whether to prosecute a company often comes down to an exercise of prosecutorial discretion.

3. Q. *What type of punishment is imposed on corporations?*

   A. A convicted corporation may be subject to stiff fines. It may also face the imposition of a court-appointed monitor to oversee certain aspects of its affairs as well as other limitations on its conduct through a term of probation. Restitution is a necessary component of any sentence. A convicted corporation may also face debarment from service as a government contractor and may suffer other negative collateral consequences if it operates in a regulated industry.

4. Q. *Can a company and its employees be prosecuted for the same conduct?*

   A. Yes. A corporation, as an artificial entity, can only operate through the acts of its agents. Those agents may be prosecuted along with the company if their conduct and state of mind individually are sufficient to create criminal liability.

5. Q. *Who determines whether a corporation will be charged criminally?*

   A. The prosecutor's office investigating the conduct decides whether to bring criminal charges. In the federal system, a company generally may seek review of the decision of a local United States Attorney's office – there are 93 of them – by Main Justice in

Washington, D.C. State prosecutors often lack the same "up the chain" review process and the office conducting the investigation has the final word on whether to seek charges.

6. Q. *What role does the grand jury play in the process?*

   A. The grand jury is a vehicle for compelling the production of documents and data, as well as testimony, for review by the prosecutor. By law, it operates in secrecy but from time-to-time leaks occur. In the federal system, a company being investigated has no right to present information to a grand jury. In some states, that right may exist.

   At the conclusion of the investigation, the prosecutor asks the grand jury to make a determination that there is probable cause to believe a crime has been committed. Such a determination is called a vote of a "true bill of indictment."

   Technically, the grand jury is to serve as "a sword and a shield," deciding when charges should be pursued and protecting the innocent. As a practical matter, grand juries do what prosecutors ask of them. As one noted criminal defense lawyer put it, "a prosecutor could get a grand jury to indict a ham sandwich if he wanted to."

7. Q. *Can both state and federal criminal charges be brought based on the same conduct?*

   A. Technically, yes. But federal Department of Justice policies and those of some states discourage dual state and federal prosecutions and thus, they are a rare occurrence. That said, federal and state authorities may coordinate efforts in investigating corporate conduct.

8. Q. *What does it mean for a company to be indicted?*

   A. A company that is indicted faces felony criminal charges. It enjoys essentially all of the rights of an individual defendant facing criminal charges – namely, the right to a trial by jury at which it may confront the evidence against it and call witnesses on its own behalf. Notably, corporations do not enjoy the privilege against self-incrimination provided individuals under the Fifth Amendment to the United States Constitution.

9. Q. *How long do investigations of possible corporate criminal misconduct typically last before a decision is made whether to seek indictment?*

   A. A number of factors effect the length of time it takes to complete a given investigation. Among those factors are: the complexity of the charges being considered; the resources of the agency conducting the investigation; the schedules and caseloads of the prosecutors conducting the investigation; whether the prosecutors must compel the production of evidence residing outside the United States; and the extent to which the company and key individuals cooperate.

   The ultimate deadline is imposed by the statute of limitations, which is five years for most federal crimes although some, such as bank fraud and insurance fraud, have ten year statutes of limitations. The government can request that a target or subject of an

investigation voluntarily extend the statute of limitations and that occurs from time-to-time.

All that said, it is common for an investigation of complex allegations by a prosecutor in a major metropolitan venue to take 18 to 36 months before a decision is made whether to seek charges.

10. Q. *Is there anything the company can do to accelerate the investigation?*

A. Usually not. Prosecutors generally do not like to be rushed and thus, pleas to allow the company to put the matter in the past typically fall on deaf ears.

Sometimes, if there is a compelling business reason, counsel may make a pitch to have a decision rendered provided that the investigation appears to have been fully conducted and the matter is languishing. Also, if the company has a compelling business reason to make public that no criminal action will be taken, counsel may bring this to the government's attention. Great care must be taken in how this is done, if at all, given that time is usually the friend of those who are under investigation.

11. Q. *Must all employees of the corporation cooperate in the investigation?*

A. Individual employees, unlike the corporation, retain a Fifth Amendment privilege against self-incrimination which allows them to refuse to be interviewed by the government or testify before a grand jury. However, the company may take action against an employee based on his or her refusal to cooperate in its investigation of the allegations.

12. Q. *Are employees entitled to their own lawyer and if so, does the company pay for counsel?*

A. Employees whose conduct is subject to review in the investigation may have their own counsel and in most instances, if they are to have their own counsel, the company is well advised to recommend a lawyer who practices in this area and will coordinate with company counsel.

Generally, the company's by-laws and the law of the state of incorporation will determine whether the employee is entitled to be indemnified for attorneys' fees and, if so, whether there is an obligation to advance fees as well. Company counsel should sort through this issue and develop a system for seeing that those employees in need of counsel get to the right lawyers and that the lines of communication remain open.

13. Q. *Are there any guidelines used by the government for determining whether to prosecute a corporation?*

A. Yes. In the late 1990's, the United States Department of Justice began developing a set of principles to be used in deciding whether to prosecute a corporation. Those principles currently are set forth in a memorandum issued August 2008 entitled Principles of Federal Prosecution of Business Organizations. While theses guidelines apply only to

federal prosecutions, they also can serve as the basis for an informed discussion on an indictment decision by state and local prosecutors.

As a threshold matter, a prosecutor will consider fundamental factors such as the sufficiency of the evidence, the likelihood of success at a trial, and the deterrent effect of a prosecution. Additionally, the prosecution will evaluate:

(1) the nature and seriousness of the offense, along with the harm to the public;

(2) the pervasiveness of wrongdoing within the organization and the complicity of senior management;

(3) the organization's compliance history;

(4) whether there has been timely and voluntary disclosure of wrongdoing and meaningful cooperation;

(5) the existence and effectiveness of a compliance program;

(6) remedial actions, including discipline of employees and revisions to the compliance program;

(7) collateral consequences, including disproportionate harm to shareholders and employees not engaged in wrongdoing;

(8) the adequacy of the prosecution of individuals within the organization who are responsible for this misconduct; and

(9) the adequacy of alternative civil and regulatory remedies.

Prosecutors have broad discretion in applying these guidelines.

14. Q. Can regulatory proceedings and civil litigation go forward at the same time as the criminal investigation?

A. Yes. There is no general prohibition against so-called "parallel" civil or regulatory proceedings going forward at the same time as a criminal investigation or prosecution. However, matters may be complicated by individuals' assertion of their 5th Amendment privilege and other issues not present absent a criminal proceeding. Often the prosecutor will seek a stay of parallel proceedings pending resolution of the criminal matter. Defendants often favor this, but in some instances, a defendant may see an advantage in the civil or regulatory proceeding as a vehicle for developing the defense to criminal charges. Courts frequently do stay parallel proceedings but a stay is not automatic.

15. Q. *Can a corporation assert a privilege against self-incrimination under the 5th Amendment to the United States Constitution and refuse to produce documents or allow employees to provide testimonial evidence?*

A. No. The Supreme Court of the United States has determined that a corporation lacks the protection under the 5th Amendment of the United States Constitution against compelled self-incrimination. A corporation may not withhold damaging documents or testimony tending to establish guilt. Corporate agents and employees, however, retain a personal 5th Amendment privilege and may not be compelled to provide self-incriminatory testimony, even though it may implicate the corporation in wrong-doing.

16. Q. *Does a company have a right to be heard by the prosecutors or grand jury prior to the decision on whether criminal charges will be brought is made?*

A. Technically, a corporation does not have a "right" to present arguments against criminal charges to a prosecutor, at least in federal investigations. However, as a practical matter, it is the rare prosecutor who will not grant an audience to a company and its counsel before deciding to proceed with criminal charges.

A host of considerations go into whether and how to make such a pitch.

First among them is defense counsel's sense of whether there truly is a possibility of dissuading the prosecutor from proceeding.

If the company has been represented by competent counsel, lines of communication should have been open throughout the investigation. Indeed, defense counsel – and perhaps company representatives – will likely have had meetings and made presentations to the prosecutors leading up to the time of the charging decision with the goal of demonstrating that the company has taken the allegations seriously and is being cooperative. Even if the company has not taken the now common cooperation route, some form of dialogue between the prosecutors and defense counsel should have been present and based on this history, defense counsel and the company will make judgments concerning the nature and scope of any presentation.

The risk in such a presentation is that the company will be giving away any defense it might use at trial. However, given the negative consequences of criminal charges alone, absent a conviction, most companies will take the chance of a more fulsome discussion of the evidence and law if there appears to be a chance at convincing the prosecutor to decline charges or perhaps enter into a deferred prosecution or non-prosecution agreement.

In some jurisdictions, a party that is a target of a grand jury investigation may have the right to appear and provide evidence on its own behalf before a vote on a true bill of indictment is taken.

17. Q. *Can prosecutors eavesdrop on electronic communications such as telephone calls and emails as part of the investigation?*

A. Law enforcement's interception of telephone calls and emails without the permission of one of the parties to the communication is generally illegal. Most jurisdictions allow the interception of communications if one party consents to the interception. The federal government can obtain a court order allowing covert electronic surveillance absent one-party consent in certain limited circumstances.

18. Q: *Can law enforcement authorities search a business and seize electronic data, documents, or other property?*

A. Yes. To do so, absent exigent circumstances, the prosecution must obtain a search warrant from a court, demonstrating that there is probable cause to believe evidence of a crime exists at the premises to be searched. The limits of the search warrant – in terms of area searched, type of evidence, time frame for the search – are to be narrowly drawn. Search warrants in business cases typically are obtained confidentially and the evidence supporting the issuance of the warrant is often under seal until there has been as indictment.

19. Q. *How likely is it that a prosecutor will decline to bring charges after having committed extensive time and resources in a lengthy investigation?*

A. Human nature suggests that a prosecutor would be inclined to want to show something for the effort of a lengthy criminal investigation, and that "something" would be criminal charges against an individual or company. However, ethically, a prosecutor's first obligation is to do justice. That means considerations like the effort that has gone into a particular matter cannot enter into the determination whether to bring charges. The law and evidence must be the primary motivating factors. Accordingly, a company's best chance at avoiding criminal charges following a lengthy investigation is to convince the prosecutor that based on the law and evidence, the prosecutor will not be able to obtain a conviction. Prosecutors do, where circumstances warrant, decline to bring charges following a lengthy investigation.

20. Q. *Are there formal actions that can be taken short of a criminal prosecution which may advance the interests of law enforcement yet spare the company the burdens of prosecution?*

A. Yes. In recent years it has become quite common for federal prosecutors to enter into "deferred prosecution agreements" or "non-prosecution agreements," which impose some form of penalty on the company without the stigma and other consequences of a criminal conviction.

In a deferred prosecution agreement, the government typically brings criminal charges but does not pursue them provided the company adopts a number of remedial measures and usually pays a fine. If the company engages in no criminal conduct for an agreed upon period – usually two or three years – and otherwise complies with the terms of the agreement, the charges are voluntarily dismissed.

In a non-prosecution agreement, similar restrictions are imposed but formal charges are never brought provided the company meets the agreed upon conditions. The company may be required to extend the statute of limitations to allow prosecution in the event of a breach of the agreement.