

Violating Federal Regs Can Have Criminal Consequences

By David Axelrod

Business law is rapidly becoming enmeshed with criminal law. This creates new hazards for corporations and corporate officials, stemming in large part from the government's reliance on criminal sanctions to enforce federal regulations.

The government's effort is fueled by a cocktail of highly complex regulations and expansive criminal statutes that can ensnare even the most savvy corporate officials. Especially difficult problems may arise when a corporation discovers that offenses have already been committed by employees acting in its name.

Obstruction and misprision

Once an offense is committed, or even suspected, it is a separate crime to interfere with its investigation.

The federal obstruction of justice statutes broadly prohibit corrupt attempts to interfere with investigations, criminal trials and other federal proceedings. These provisions have been applied to countless situations, and conviction can result from mere suggestion. For example, in a case where the ownership of certain trusts was at issue, the court ruled it would constitute obstruction if a defendant's attorney smiled and said suggestively to a grand jury witness, "Well, you don't own any trusts, do you?"

Special problems arise when employees become witnesses in an investigation of their employer. Any effort to insulate employees from government investigators may be viewed as obstruction. An attorney was convicted of obstruction for advising a corporation to hide an employee whom the government was attempting to serve with subpoena.

It may also be obstruction for corporate counsel to advise an employee not to testify based on the Fifth Amendment privilege against self-incrimination. Such advice is inherently suspect as it may be intended to protect the company rather than the employee.

Although corporate counsel may inform employees of the existence of the privilege, without advising it should be invoked, the line between advice and information is hard to draw. Therefore, the company ordinarily should arrange for separate counsel for employees who are contacted by the government.

The obstruction statutes also mandate consideration of when evidence must be preserved. Obviously, subpoenaed documents cannot be destroyed under any circumstances. The more difficult question concern documents that relate to the pending investigation, but which have not

been subpoenaed. There is little authority regarding precisely when the obstruction statutes protect such documents.

Some commentators opine that an investigation agency must take "focused action" regarding a matter before the duty to preserve evidence is triggered, but that view is far from authoritative, and may be relied on only at your peril. The federal statute prohibiting "misprision" of a felony must also be considered by anyone who seeks to correct a completed crime. Its breadth is startling: it encompasses anyone who, "having knowledge of the actual commission of a "federal felony... conceals and does not as soon as possible make known the same to 'appropriate authorities,'

The mere failure to report a crime does not violate this statute, but there is little other reason for comfort.

Environmental violations illustrate the nature of this problem. If, for example, corporate officials discover that their environmental manager has "saved" the company money by improperly buying hazardous waste in a remote area, a seemingly obvious solution would be to dig up the waste and dispose of it properly. However, such "corrective" action may constitute misprision because it has the effect of concealing the original crime.

No easy answers

How can these sorts of problems be avoided? In some cases there is simply no choice. For example, regulatory statutes commonly required disclose once a violation is detected. Moreover, even in the absence of formal requirement, disclosure may be required as a practical matter, since to do otherwise risks accusation of misprision and/or obstruction. In any case, the primary mission will be damage control. It will often require tremendous creativity to make the required disclosure without precipitating a criminal investigation, followed by years of intensive regulatory scrutiny. On the other hand, some agencies have "voluntary disclosure" policies which may assist avoiding criminal prosecution.

The government may also be willing to forego criminal prosecution where the companies has implemented an (otherwise) effective compliance program and demonstrated a long-term commitment toward good corporate citizenship.

Increasingly, there are no easy answers for corporate officials who are confronted with these sorts of problems. The most obvious solution, and the one most strongly emphasized by the government, is prevention. However, when prevention fails, as inevitably it sometimes will, corporate officers must be especially careful not to commit new offenses while attempting to minimize damage from old ones.