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**EXPERT OPINION**

## Compliance survival guide for the busy and at-risk executive

Over the past decade, the climate for federal business crimes enforcement has changed dramatically and the risks associated with “slip-ups” have sky-rocketed.

Companies and their leaders need to be aware that the following forces have converged to create the perfect prosecutorial storm:

- The blurring of the line separating crimes from negligence or civil violations.



### LEGAL ACTION

Peter  
Anderson

- The reduction in the amount of evidence needed to prove criminal intent.

- The expansion in the number and complexity of federal crimes.

The levels of priority status, financial resources and coordination among law enforcement agencies are at an all-time high. The harsh fines and lengthy mandatory jail sentences imposed on first-time individual

offenders continue to set new records.

Executives, managers, and board members who ignore these trends and fail to adapt to this new high-stakes climate do so at their extreme peril.

### Be proactive

The best form of self-insurance for any business in any industry is an effective compliance program. When it comes to compliance programs, there is no “one size fits all” formula. Different companies face different risks that need to be addressed. However, the federal sentencing guidelines were recently amended to incorporate the following criteria for evaluating the effectiveness of any compliance program:

- Establishing a compliance program with standards and procedures.
- Centralizing compliance oversight in high-level post.
- Avoiding delegation to unfit individuals (i.e. conduct background checks).
- Communicating standards and procedures to employees through training.

- Achieving compliance with program through monitoring.

- Enforcing standards consistently.

- Responding appropriately to offenses and improving the program accordingly.

**Every company and executive under investigation always claims they care about compliance. The only meaningful response is what can be shown or documented.**

inconsistent with any intent to violate the law.

### Plan for reactive steps

No compliance plan is perfect, and no program can prevent every incident. Therefore, in addition to the proactive steps, companies need to plan in advance for how to react if and when an investigation arises. Companies and executives who are inexperienced or unfamiliar with the process often make common missteps in four critical stages. Here’s how you should react:

#### Bring experienced counsel to interviews.

Regardless of how informal the investigation appears, or how friendly the investigator seems, every criminal investigation needs to be taken seriously. The underlying reason for the interview is to gather facts. Any statement made can be used against you. Before agreeing to be interviewed, hire experienced counsel to determine your status in the investigation (i.e. witness, subject or target).

Don’t fall into the trap of assuming that “I need a lawyer only if I am guilty.” Apart from the

underlying regulatory crimes being investigated, there are serious consequences if the investigators perceive that you were untruthful or misleading during such interviews. Don’t go it alone.

#### Take all subpoenas seriously.

Grand jury subpoenas are investigative tools used to gather documents and testimony in a criminal case. Accordingly, they need to be taken seriously and carefully reviewed from the minute they are served. Any noncompliance with the terms of the subpoena is a crime. Witnesses who are subpoenaed to testify need to be adequately prepared in advance of any testimony. In addition to producing the information sought, it is equally important to record the process that was followed in locating, reviewing and producing the documents.

#### Assist but don’t consent or expand search warrants.

Sometimes the government feels compelled to surprise a company during the investigation by using a search warrant. This is often a clear sign of trouble, and the legal response options are limited since the government maintains superior legal leverage at this stage. Experienced counsel can help achieve important goals by reviewing the search warrant for defects; limiting and not expanding the scope of the search; getting the government what it is entitled to receive, but no more; and getting critical insight into the investigation.

#### Expedite and protect internal investigations.

There are numerous issues that need to be assessed in deciding how and when to conduct such an investigation, but the most important goals are to: 1) understand what the government is investigating; 2) find relevant documents; 3) identify and interview witnesses; and 4) be prepared to respond and persuade the government not to bring criminal charges.

One sports analogy that applies in business is that the best offense is a strong defense. Adhering to these proactive and reactive measures will better protect the legal interests of the company and its leadership.