

This article appeared in "The Law Journal 2007," a supplement to the September 2007 Oregon Business Magazine.

Internal investigations: Be alert, be prepared and hire the right professionals **By Steven B. Ungar and Robert R. Calo, Lane Powell PC**

Business professionals working in the post-Enron landscape are acutely aware of perils that can arise from the misconduct of employees, officers, directors and even independent contractors. These perils, including financial and criminal exposure at the individual level, have heightened concerns about compliance and enforcement.

Since 2001, several high-profile companies accused of stealing from shareholders have been investigated and in some cases saddled with criminal convictions and prison sentences. Accounting companies and pharmaceutical companies have ended investigations and avoided prosecution only after paying enormous penalties.

The criminal net is being cast over an ever-widening swath of conduct that in years past would have been resolved in the civil or regulatory realm. According to a U.S. Securities and Exchange Commission official who spoke at a recent conference, about nine of every 10 formal investigations are today referred to the Department of Justice for potential criminal prosecution; 15 years ago, only one of those cases would have been referred.

For business people, these dangers have expanded significantly. A principle of criminal law used to be that criminal liability required actual criminal intent. This is often not the case in the post-Enron world, where "I should have known" may be sufficient culpability for a conviction.

Anti-fraud laws, and the aggressiveness of investigators charged with enforcing them have marched forward with great vigor. After the Enron bankruptcy, federal legislation, convictions of executives and increased scrutiny by the SEC and state securities regulators have resulted in new obligations being imposed on companies discovering the conduct of a rogue employee or worse.

These obligations are also spelled out in U.S. Department of Justice policies. The policies require a company to be proactive and aggressively police itself to ferret out fraud or other misconduct. If misconduct is suspected or confirmed – even where the government gets there first – it is the business's duty to conduct its own investigation.

From a cost-benefit standpoint, decisionmakers must decide whether the cost of conducting an investigation is likely to be more expensive or dangerous than not conducting one. Betting wrong can be disastrous, especially if a decisionmaker is accused of burying the problem, either to save money or to protect certain individuals – or both.

Compliance safeguards need to be put in place. If this is done properly, much policing can be done from the inside with relatively little need for outside counsel. Yet in cases where the suspicion or evidence of employee misconduct reaches the criminal sphere, plainly the

conservative approach is to contact a lawyer who understands the terrain and has current experience with both the regulatory and criminal justice systems.

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