

WHITE-COLLAR CRIME

FIGHTER

www.wccfighter.com

VOLUME 13 NO.6
JUNE 2011

YOUR SECRET WEAPON IN THE WAR ON FRAUD

STROZ FRIEDBERG

DIGITAL RISK MANAGEMENT & INVESTIGATIONS

David Rosenfield, Counsel, *Herrick, Feinstein, LLP* and
Joseph P. Dooley, CPA/CFP/CITP, CFE, CIPP, *Stroz Friedberg*

When the Feds Come Knocking...



Two FBI Special Agents drop by your office to ask you “a few questions” related to “a client complaint” about possible fraud at your organization. You take the agents into a conference room where they proceed to interview you. You are given no Miranda warnings and are not placed under oath.

Do you have to tell the agents the truth?

What are the legal risks to you in this interview?

The answers are, unfortunately, not simple. However, regardless of whether fraud is occurring in your organization, whether you are guilty or not or someone who works for the organization may be, there are several important decisions that you must make when that knock on the door is answered.

CAUTION IS THE WORD

In a nutshell, when dealing with the federal government, your rule of thumb should be to choose your words very carefully.

Reason: It is a felony to lie to the government, punishable by jail time.

It doesn't matter that the lie wasn't made under oath.

It doesn't matter that you weren't warned of the possible consequences of lying.

It doesn't even matter that the lie didn't deceive the government.

PERJURY VS. FALSE STATEMENTS

Perjury occurs when, having taken an oath to testify truthfully before a “competent tribunal,”

i.e. a court, a person makes a material misstatement which he or she does not believe to be true.

A person makes a false statement when, in a matter within the jurisdiction of the executive, legislative or judicial branch of the U.S. Government, he or she knowingly and willfully makes a materially false statement.

Perjury includes:

- False statement under oath in court.
- False statement in testimony before a grand jury.
- False statement to the SEC in on-the-record inquiry.
- False statement in civil deposition testimony.

False statements include:

- Untrue statements to an SEC attorney over the telephone.
- False statements in response to law enforcement questioning.
- Falsely certifying a document under penalties of 18 U.S.C. § 1001.
- False Statements Law-18 U.S.C. §1001

PENALTIES FOR FALSE STATEMENTS AND PERJURY

- Imprisonment for up to five years.
- A fine of up to \$250,000.
- Penalties apply for each instance charged.

Important: In federal fraud cases involving perjury or false statements, only the Department of Justice can bring criminal charges.

However, the SEC can refer a potential fraud case to the prosecutor's office.

OTHER CRIMINAL STATUTES

When, in that hypothetical situation where the FBI agents arrive at your office seeking information about a potential fraud, the cautions recommended above regarding what you say to them apply to additional tricky criminal laws as well—including those pertaining to obstruction of justice.

TWO KEY SITUATIONS

Here are two potential scenarios to be extremely cautious about whether you suspect that fraud is occurring in your organization or not...

- Surprise or “ambush” interviews in which the interviewee has no attorney present.
- Scheduled interviews, in which the interviewee usually has an attorney present.

THE SURPRISE INTERVIEW

From investigators’ perspective, this is a valuable tool designed to obtain critical evidence about a fraud.

It is a method used by agents to informally question witnesses during the initial stages of an investigation.

Often it is intended to catch the interviewee in a lie—by questioning the person when he or she is unprepared. The tactic used for this purpose is often “playing dumb”—so the interviewee gains a false sense of security and trust and “spills the beans.”

What to expect in a surprise interview:

- The interview will be conducted by either criminal investigators (FBI agents) or regulators.
- It will occur most often at the individual’s home—early morning or late in the day.
- It may be attempted at the office during the execution of a search warrant or during a surprise regulatory examination.
- No Miranda warning is required because the interview is not a custodial interrogation (there has been no arrest).
- A report will be prepared.
- Agents may attempt to convince the interviewee to sign a statement or affidavit. Do not sign anything without an attorney’s prior review and advice.
- If no search warrant is involved, the agents may seek voluntary consent to search the premises and/or computer. Again, legal counsel should be called in before consent is given.

YOUR RIGHTS AND PROTECTIONS

- Targets of surprise interviews are not legally required to agree to the interview—unlike a subpoena where testimony is compelled (even if you invoke the Fifth Amendment against self-incrimination).

Exception: Some regulators can impose

sanctions for failure to cooperate. Consult legal counsel on this.

- Prospective interviewees are entitled to retain counsel or to speak to a supervisor or company attorney.

Important: If the agent asks why you need an attorney or suggests that you have something to hide, don’t take the bait! And don’t make up a reason for refusing to talk...just decline to do so.

Rules to follow when being pressed to agree to a surprise interview:

- Be respectful, but do not be intimidated.
- Consider postponing the interview. This “buys” time to review the facts and prepare with an attorney—and to determine whether you have exposure to criminal charges under federal law.
- Don’t talk—listen carefully.
- Obtain business cards of agents.
- Immediately advise your personal attorney, supervisor or corporate counsel. The presence of an attorney should protect against a potentially unfair or deceptive interrogation.

Bottom line: The decision whether or not to submit to a surprise interview during a criminal or regulatory investigation is critical for both the individual and his/her company. Declining to do so, so that the individual has a chance to carefully review the facts and speak to an attorney is usually the best choice.

THE SCHEDULED INTERVIEW

- Preparation is the key.
- Consider retaining an experienced white-collar crime attorney.
- Carefully review the facts of the allegations.
- Carefully review any relevant documents that you have access to.
- Decide whether to even participate in the interview.

What to do—and not do—during the interview:

- Do tell the truth.
- Do tell only what you remember—it’s okay to say, “I don’t recall.”
- Do ask for clarification.
- Do talk to your attorney alone if you need to.
- Don’t lie.
- Don’t speculate.
- Don’t overstate or exaggerate.
- Don’t minimize.
- Don’t keep silent if it may mislead.
- Don’t conceal or cover-up.

White-Collar Crime Fighter sources:

- David Rosenfield, Counsel, Herrick, Feinstein, LLP, attorneys, New York, drosenfield@herrick.com.
- Joseph P. Dooley, CPA/CFF/CITP, CFE, CIPP, Managing Director, Stroz Friedberg, New York, jdooley@strozfriedberg.com.