

Criminal and Civil Investigations of Corporate Debtors and Management

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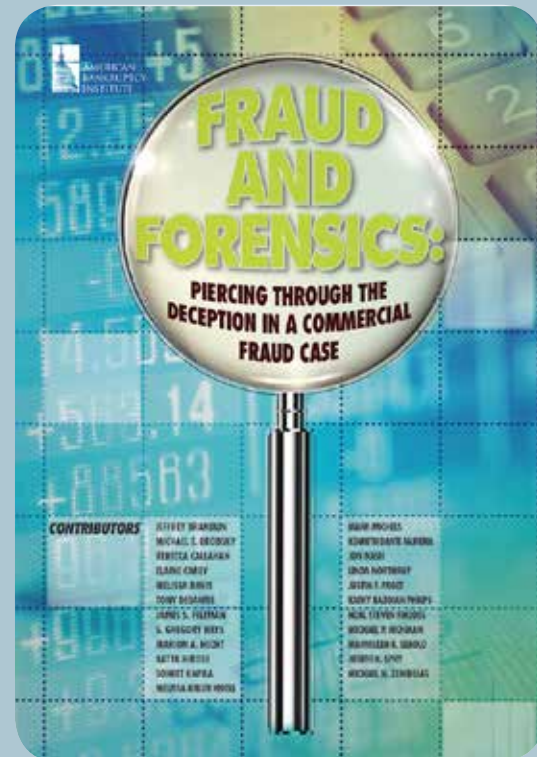


Fraud and Forensics

Piercing Through the Deception in a Commercial Fraud Case

It is a sorry statement about the pervasiveness of fraud in society today that the demand for the specialized financial and investigatory skills of forensic accountants is greater than ever. Yet some of the most celebrated cases of the modern era — *Madoff* and *Enron*, for instance — have hinged on the ability of talented investigators to ferret out the truth in a realm filled with deceit.

Fraud and Forensics: Piercing Through the Deception in a Commercial Fraud Case highlights the areas of specialty, challenge and reward for forensic accountants and the professionals who work with them in commercial fraud cases. It provides a broad and deep look at challenges faced in the course of a commercial fraud matter, as well as the tools available to help identify, unwind and prove fraudulent transactions.



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Government Knocking at the Door: Now What?

September 2015
Kevin Evans – Armstrong Teasdale

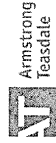
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Investigation

Do's:

- As early as possible decide who will interface with the investigators and manage interaction with company.
 - Inside vs. Outside Counsel, time commitments, attention span.
- Be professional and likeable (does not mean should be milk toast or sycophantic).
 - Balancing act.
 - Can be challenge if facing “law-and-order-type” agent and/or prosecutor.
- Demonstrate spirit of cooperation.
 - Document *everything* you do with the investigators.
- Maintain consistent and ongoing dialogue (status of investigation/focus).
- Address questions as they arise in expeditious and complete fashion.
- Decide if and how going to present info to Government.

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Investigation *(cont'd)*

Don'ts:

- Cop attitude of superiority/experience.
- Be unlikeable.
- Ever commit to something until you're sure you can deliver.
- Delay in starting to respond to requests for information.
- If need more time, ask for it as soon as you realize need.
- Be perceived as less than forthcoming/open/truthful.

Investigation (cont'd)

- 2 similar situations: one where company engaged in “Don’ts,” and other where company followed “Do’s.”
- Academy for Educational Development.
 - For many years was one of USAID’s largest contractors and implementing partners in US and worldwide.
 - 2500 employees worldwide.
 - Investigated for potential fraud and abuse in connection with projects in Pakistan and Afghanistan.
 - Took hard line position: information USAID OIG requested was too intrusive and it was not required to provide.

Investigation (cont'd)

- One employee later said that the company did not engage and “pushed OIG off.”
- Offended OIG.
- USAID suspended.
- Was death knell of long-time USAID partner, resulting in sale of company.
- **Company that followed “Do’s.”**
 - Shortly after AED, client notified by USAID OIG it was under investigation for project in Afghanistan.
 - We immediately engaged in face-to-face with agency.

Investigation *(cont'd)*

- Persuaded USAID that company was committed to doing the right thing.
- We would perform robust internal and report.
- Offered OIG opportunity to comment on investigation plan; it did.
- Consistent/weekly interactions and meetings with investigators in Kabul.
- Results: reported findings, returned certain payments, declination, and letter from OIG praising company for responsibility and integrity.

Investigation (cont'd)

- Not limited to USAID matters.
- Environmental lab called me with 30 armed agents conducting search.
 - Lead investigator and prosecutor repeatedly said company was target and would be indicted.
 - Immediately developed good working relationship with them both.
 - Kept them apprised of corrective action measures.
 - Went out of way to work with them in terms of subsequent requests for information and interviews.

Investigation *(cont'd)*

- Allowed to submit white paper, meet with heads of Environmental Crimes Section in DC, and respond to follow up question.
- End of day, Gov't declined.

Investigation (cont'd)

- Lessons:
 - First impressions are very important.
 - Perceptions can change over the course of a lengthy investigation – not so much over short ones.
 - If dig heels in at outset and give impression of unwillingness to cooperate, hard to shake.
 - Personalities also matter.
 - No matter how obnoxious the agent (or prosecutor), you cannot exchange tit-for-tat.
 - Nothing good comes from that.
 - When under fire, document everything.
 - Gov't has all the power.
 - Have to go out of way to be likeable and trustworthy.

Investigation (cont'd)

- May not result in declination, but likely will lessen the blow.
 - Perhaps a nonprosecution agreement.
 - Perhaps a pretrial diversion.
 - Perhaps a reduced fine.
 - If Gov't contractor, perhaps avoid debarment or suspension (or at least decrease the period).

Search

- Been on site while being executed.
- While do not want to interfere, there are steps you want to take.
- Of course, General Counsel needs to be involved immediately (assuming company has a GC).
- Contact your white collar counsel.
 - If possible, needs to try to get on site asap.
- Outside counsel should:
 - Immediately engage lead case agent.
 - Copy of search warrant.

Search *(cont'd)*

- Will provide focus of search.
- Will describe areas that can be search and material seized.
- Promptly (while search ongoing) contact prosecutor.
 - Focus of investigation.
 - Targets/subjects.
 - Whatever other information prosecutor is willing to share, such as timing.
 - Understanding that employees should not be interviewed (can ask but don't be surprised with lack of agreement).
- Communication with employees.
 - Not required to speak; if do tell the truth (avoid appearance of obstruction).

Search *(cont'd)*

- Company should be willing to pay for counsel to represent employees in subsequent interviews, and employees should be told this.
- Instruct employees not to discuss amongst themselves (during search or thereafter).
 - Obtain inventory of material seized by agents.
- Company should consider contacting employees and telling nonessential employees to remain at home, or if on premises, sending nonessential employees home (to extent agents do not engage in heavy handed refusal to permit).

Search *(cont'd)*

- Immediately after search, outside counsel should:
 - Debrief employees who were interviewed.
 - Corporate Miranda disclosure.
 - Meet with prosecutor.
 - Focus of investigation.
 - Targets/subjects (not just for curiosity; has ethical implications in terms of representation and need to decide whether disciplinary measures (e.g., suspension with/without pay) is appropriate).
 - Obtain copy of material seized (particularly if necessary for ongoing business operations).

Search (cont'd)

- Company needs to suspend document destruction/deletion per retention policy.
 - Document preservation/hold letter.
 - Even after search, grand jury subpoenas are likely.
- Company needs to engage outside counsel to conduct internal investigation to understand any issues/problems and for reasons noted earlier.
 - During employees interviews, need to give Corporate Miranda disclosures.

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