



How Executives Can Avoid Prosecution in an Economic Downturn

Featured Story

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When a recession hits, prosecutors and others will look to blame executives, however there are some steps executives can take to avoid becoming victims in the next wave of white collar prosecutions.

Executives prepare for the worst when running companies, but they often don't prepare for the worst case scenario in their own professional lives. With the economy facing a risk of an imminent recession, many executives have not prepared themselves for the possibility of being accused of corporate misconduct.

Many are surprised when they are on the receiving end of an accusation. They think they have not done anything wrong. They don't believe their colleagues would point an accusatory finger towards them. The

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idea of an investigation seems like an unrealistic nightmare.

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But when the economy falters, there is always a search for people to blame. And the search inevitably focuses on the executives of struggling companies.

In the event of a recession, who will be ready to blame executives? Nearly everyone. Prosecutors want to bring fraud charges against senior executives if they can. Politicians want to provide an explanation for the downturn, preferably one with an easy villain.

Employees want someone to be accountable for why they have lost their jobs or their income. Even other members of management may be quick to blame the company's executives, sometimes as a way of distracting from their own poor business decisions.

This pattern has repeated itself over time. The dot.com bubble burst in the early 2000s, which was followed by a flurry of high-profile prosecutions of executives in Enron, WorldCom, and many others. The financial crisis last decade was followed by frenzied efforts to pursue executives of large financial institutions.

Take Action Today to Avoid Prosecution Tomorrow

The same rush to judgment is likely to happen again in the next recession. Here are suggestions to help

you avoid becoming the next victim of the next big wave of white collar prosecutions.

- If sales are down, be ready to acknowledge it. If a company struggles, prosecutors will be looking for false statements, matching internal emails and texts with public statements to see if executives really believed the story they were telling to investors or business partners. It is better to lose a job than to face prosecution.
- Make sure that the company's legal and accounting personnel and third party professionals—including both internal and external auditors—agree with the estimates in your financial statements. Make sure you have disclosed all of the facts to your auditors. If done properly, that can be a powerful defense to show that you did not have an intent to mislead anyone.
- Do not make any false statements. Be careful about jokes that can be misinterpreted years later.
- Do independent work to confirm the accuracy of the certifications that you receive from your direct reports. Do not accept these certifications at face value. And before you sign your own certification, make sure that you have done your due diligence and are ready to defend it.
- Do not sell your shares if you expect bad news for your company. If you do, make sure that a good lawyer has signed off on the legality of the sale. The government brings insider trading charges with alarming regularity.
- Do not let whistleblower complaints die on your desk. Make sure that any potentially viable whistleblower complaints are appropriately investigated by the board of directors or independent management who is not accused of wrongdoing and who does not report to anyone accused of wrongdoing. And be careful about participating in any adverse employment decision of anyone who could claim whistleblower status.
- Do not destroy potentially relevant documents outside normal processes, and do not engage in

any cover-ups. In the search for proof of a guilty mind, prosecutors often look for shortcuts. If you abruptly destroy documents or tell someone else to keep quiet about a questionable transaction, you are handing a weapon to a prosecutor and allowing him or her to cast a sinister light on everything else you did.

- If a business practice is too clever by half, you will probably regret it, especially after the downturn has begun. If a business practice feels wrong, say something and stop the practice. If the practice is shady, it is likely prohibited by some broad federal criminal law.
- Make sure that your company has strong indemnification policies that allow for advancement of expenses. If you are accused, you will find that very good defense lawyers can be prohibitively expensive and difficult to retain without the benefit of a very good indemnification policy. Make sure that the company has kept its D&O insurance policies current and sufficient to cover costs of defense of not just you, but many other officers and employees.

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How Innocent Executives Become Ensnared in Government Investigations

These traps await the unwary or inattentive executive, and can place innocent executives in the crosshairs of a government investigation. Executives often underestimate how easily the government can

create a circumstantial case against them. A talented government lawyer can take a few bad emails, elicit corroborating testimony from a few unfavorable witnesses, read a few key statements out of context, and turn an unfortunate business situation into a fraud indictment.

Executives should act now to avoid a circumstantial case in the future. They should take a hard look at themselves and ask if any of their conduct could be misconstrued by the government in a future investigation. They should act now to ensure that they are not the defendants in the next generation of criminal cases and civil enforcement actions.

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