

U.S. Task Force Sets Sight On New Targets

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Since its establishment in July 2002, the federal government's Corporate Fraud Task Force has obtained 600 corporate related convictions and collected more than \$2 billion in fines.

Its high-profile victories line up like trophies in the halls of the U.S. Department of Justice: Martha Stewart, Frank Quattrone and most recently, Bernard Ebbers.

With no new mutli-billion dollar frauds on the horizon and Kenneth Lay and Jeffrey Skilling, former top executives of Enron, expected to stand trial within a year, some defense attorneys say they are hoping the task force will take its foot off the accelerator.

But that is not likely to happen.

"I don't think our mission is over," said David Kelley, U.S. Attorney for the Southern District, a key player on the task force.

To that end, the task force has now set its sights on different targets, specifically, those from outside a company who may have abetted fraud--accountants, lawyers, suppliers and financial advisors.

President George W. Bush established the task force, now headed by Mr. Kelley's predecessor, Deputy Attorney General James Comey, in 2002 to bolster the government's pursuit of corporate fraud.

That pursuit has paid dividends in convictions and fines, but also encouraged prosecutors to adopt a new, aggressive attitude. The tone set by the government, more than anything, is at the heart of its success and, at the same time, the target of ire.

"To be effective," Mr. Kelley said, "the task force has to repeatedly re-evaluate itself."

In the beginning, "What we did was aggressively pursue the biggest accounting frauds," he said. Indeed the task force to date has primarily concentrated on companies entangled in massive accounting fraud like Enron, HealthSouth and WorldCom.

But at this point, the task force has turned its attention to other crimes. While continuing to pursue the accounting-related cases, prosecutors are narrowing in on the facilitators of fraud. "We need to make everyone accountable," Mr. Kelley said, "not just those in the board room."

That means the government is focusing on lawyers, accountants, advisors and even outside vendors in search of wrongdoing.

One recent case cited by Mr. Kelley involved US Food Service, a subsidiary of Dutch food giant Royal Ahold. After two Food Service executives pleaded guilty to securities fraud last year, Mr. Kelley's office brought criminal charges in January against nine employees of vendors for participating in a scheme to inflate rebates owed to the grocer.

Outside of New York, a Houston jury last autumn convicted four Merrill Lynch bankers for helping Enron disguise loans as sales. These complex frauds sometimes take years to unravel. When the puzzle is solved, and prosecutors have pinpointed the actions of the company's executives,

officials have a chance to go back and look for people outside of the company who may have offered a helping hand.

Teamwork

Justice Department prosecutors have not been acting alone. They work in tandem with other federal agencies, especially the Securities and Exchange Commission, which often files civil charges alongside the criminal charges brought by individual U.S. attorney's offices.

While these agencies have always worked together, the president's formation of a task force led them to work more closely than in the past.

The task force includes members from nine different agencies and commissions and seven U.S. Attorneys, including both Mr. Kelley and his counterpart in the Eastern District, Roslynn Mauskopf, along with U.S. attorneys from Illinois, California, Pennsylvania and Texas.

Large cases have posed tremendous challenges, Mr. Kelley said, and the agencies have collaborated by improving interaction and heavier staffing, particularly at the SEC.

The SEC and other agencies often pass along information gathered in their investigations or reviews to criminal prosecutors, who generally do not begin their own probe until they suspect that a crime has been committed.

In 2002, for instance, the FBI and SEC began investigating accounting practices at Long Island based Computer Associates. Eventually, the agencies suspected that executives hampered the company's internal investigators so the U.S. Attorney in the Eastern District filed obstruction charges against several executives, some of whom have pleaded guilty.

Karen Seymour, a former assistant U.S. attorney in the Southern District who led the prosecution against Martha Stewart, pointed out that some U.S. attorney's offices, including the two in New York City and a handful of others outside New York, had a great deal of experience managing parallel investigations with the SEC. The lessons learned in these branches, from coordinating scores of documents and witness examinations to sharing evidence, were expanded nationally, said Ms. Seymour, who has since moved to Sullivan & Cromwell. "Some of the practices that were in a few offices became widespread."

Indeed, Mr. Kelley's office, which employs about 25 attorneys in the Securities and Commodities Fraud Unit led by Richard Owens, has managed many of the high-profile cases like Martha Stewart, Bernard Ebbers, and members of the Rigas family. Ms. Mauskopf's office has also pursued high-profile cases, including Computer Associates where the company entered into a deferred prosecution agreement with the government last year. Several Computer Associate executives have pleaded guilty to obstruction and securities charges.

Extreme Prosecutions

The task force has convicted more than 600 corporate-related criminals, including 77 CEOs and presidents of companies. The SEC also extracted huge fines from corporate wrongdoers: notably WorldCom (now MCI) paid \$750 million to the commission in July 2003 for accounting fraud. By contrast, from July 2002 to March 2003, the federal government recovered \$85 million in fines.

The totals are buttressed by critical victories in several high-profile trials.

More than anything, this success in the courtroom combined with aggressive prosecutions has set a tone that leaders in the business community and lawyers, many of whom were former prosecutors, find problematic.

"The pendulum has swung to the extreme in prosecutorial enforcement," Andrew Levander of Dechert said. Mr. Levander represented Michael Rigas, formerly an executive at cable giant Adelphia, in a trial in the Southern District last year where his client was found not guilty of conspiracy and wire fraud. The jury could not decide on other charges and the government plans to re-try him. Mr. Rigas' older brother, Timothy, and father, John, were found guilty of multiple counts of conspiracy, securities fraud and related charges and could face decades in prison.

Both in public forums like bar association gatherings and private meetings, defense lawyers complain of overzealous prosecutorial tactics. One such complaint involves cooperation from executives under suspicion.

Mr. Levander, who once worked at the Southern District's Securities and Commodities Fraud Unit, said the government is "certainly flexing its muscles" when it comes to bringing in executives for questioning.

Mr. Kelley said, "We have seen a change in the behavior of corporate executives from the obstruction cases." Martha Stewart, for one, was found guilty of obstructing justice when she lied to federal prosecutors questioning her about potential insider trading of ImClone Systems.

"Now they know that lying will not be tolerated," Mr. Kelley said of executives. He added that the tone of executives called in to the SEC, for instance, has become more cooperative.

While defense lawyers acknowledge that cooperation is valuable for government investigations, even reasonable objections to government requests, they say, are punished.

In an editorial published in The Wall Street Journal last week, Maurice Greenberg's lawyer, David Boies of Boies, Schiller & Flexner complained that prosecutors demand executives testify without the opportunity of knowing the evidence or allegations lined up against them. Mr. Greenberg, the former chairman and CEO of AIG, is under investigation for alleged accounting irregularities at the insurance giant. Mr. Greenberg's decision not to testify under these harrowing circumstances, Mr. Boies wrote, risked "the stigma regulators, and much of the media and public, attach to a refusal."

What the government deems cooperative goes further than hauling in executives. In many instances, investigators expect a company to waive its attorney-client privilege and make employees available for questioning. The stakes are high for those who resist.

"Number one, you'll get a lot of credit if you cooperate, and that credit can make the difference between life and death for a corporation," Christopher Wray, assistant attorney general of the U.S. Justice Department's criminal division, told a group of lawyers at an American Bar Association luncheon in February. "Number two," Mr. Wray said, "you'll only get credit for cooperation if it's authentic."

Authenticity has evolved in recent years. Companies "are not just looking for a passing grade," Mr. Wray said, "they're shooting for an A plus."

Royal Ahold, the parent of US Food Service, serves as an apt example.

The SEC described the case as "yet another deplorable example of a massive, multifaceted fraud at a major corporation."

But because the company voluntarily disclosed findings from an internal investigation, its settlement with the government included no fines.

The company also waived the attorney-client privilege, handed over documents covered by the attorney work-product doctrine, and made employees here and abroad available for interviews before finally settling with officials last fall.

Ahold's response to requests from officials was almost immediate, said Thomas Newkirk of the SEC when he discussed the case in November. Mr. Newkirk is now at Jenner & Block.

The SEC issued a set of standards in what is called the Seaboard memorandum in 2001 listing the criteria it would use to hand down penalties against wrongdoers. Cooperation remains among the mitigating factors.

The Department of Justice issued similar guidelines in January 2003 in the so-called Thompson memorandum, named after former Deputy Attorney General Larry Thompson.

In the opening lines of that memo Mr. Thompson wrote: "The main focus... is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation." He went on to explain that companies regularly mask impediments behind a veneer of supposed cooperation. Such behavior would no longer be tolerated.

Mr. Kelley dismissed criticism of overzealousness when few Enron-scale frauds have appeared on the scene in recent months.

"As soon as you say that, bingo there are other big cases out there," he said.