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PROCEDURES FOR INVESTIGATING AND PROSECUTING WHITE COLLAR CRIME

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The nature of white-collar crime often requires different methods of investigation and prosecution. Generally, white-collar crime involves conduct that is nonviolent, as well as deception, money - whether in financial, commercial or business settings - and often times fraud against the government, political corruption, and obstruction of justice. The crimes that most frequently apply to such conduct, at least in the United States, include mail and wire fraud, securities fraud, Racketeer Influenced and Corrupt Organizations Act (RICO), obstruction of justice, false statements and false claims, bribery, money laundering, and conspiracy.¹

The nature of the investigation and prosecution of white-collar crime is governed by the Federal Rules of Criminal Procedure,² and there are no separate rules of procedure for prosecuting white-collar crime. The same rules of procedure in the federal courts apply to white-collar crime, violent crimes, and drug offenses. The prosecution of white-collar crime, however, proceeds somewhat differently, primarily because of the nature of white-collar crime. For example, prosecution may include criminal charges against a corporation as well as against individuals. However, a corporation that is criminally liable is subject only to a fine as a sanction.³

Also, prosecution of white-collar crime generally occurs in federal courts, although states may also prosecute white-collar crime. There have been recent prosecutions by the Attorney General of New York concerning some corporate officials in New York State. While many states do have white-collar crime provisions, the majority of prosecutions are federal prosecutions because of the resources that the federal prosecutors have, as well as the tools provided in the Federal Rules of Criminal Procedure.

The prosecution of white-collar crime involves voluminous documents. These are document-intensive cases. They also involve defendants with substantial resources who can afford good and expensive attorneys, usually former prosecutors. Further, they generally involve an organization, whether it is a corporation or a government, as well as individuals. The prosecution often involves multiple defendants and joint defendants. Joint defendants work together and put up a united front to avoid the prosecution’s divide-and-conquer strategy of having one defendant testify against the rest.

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1. For more information on white-collar crime generally, see J. Kelly Strader, "Understanding White Collar Crime," (LexisNexis 2002).


3. Most criminal statutes include a term of imprisonment and or a fine, but because a corporation cannot be imprisoned, the only criminal sanction that may be applied to a corporation is a fine.
Criminal prosecutions for white-collar crime often involve parallel civil proceedings. For example, in addition to the recent criminal prosecutions related to the Enron and Arthur Anderson, a number of civil lawsuits have been filed on behalf of investors and employees against the corporation and against some of the individuals who were running those corporations.4

The nature of white-collar crime has led to the use of certain procedures that are designed to obtain the documents and cooperation of witnesses who can make the case against the target defendants. The primary procedures utilized by federal prosecutors are the use of the grand jury as an investigating tool and the use of plea bargains and immunity to secure the cooperation of witnesses.

The federal prosecutor uses a grand jury’s subpoena powers to obtain documents and records. The *subpoena ducas tecum* allows the prosecutor to obtain bank records, travel records, telephone records, computer databases, accounting records, corporate records, and other documents that will be helpful for the federal prosecution of a white-collar crime case. Entities and corporate targets of an investigation do not have a Fifth Amendment privilege against self-incrimination because corporations or other entities are not “persons” under the Fifth Amendment.5 The Fifth Amendment entitles only human beings to the privilege against self-incrimination. The prosecutor, therefore, can obtain any documents in the possession of a corporation or other entity.

Even the individual target has little chance of opposing a subpoena for documents in his or her possession that may incriminate him or her. Although the individual has a Fifth Amendment right against self-incrimination, the privilege does not extend to the contents of documents.6 According to the United States Supreme Court, Fifth Amendment protection only extends to compelled testimony or compelled communication.7 Thus, the U.S. Supreme Court has held that if the government did not compel somebody to make the document, there is no governmental compulsion in the creation of those documents and, therefore, there is no Fifth Amendment protection with regard to the contents.8

In addition, a corporate employee cannot claim a Fifth Amendment privilege to withhold corporate documents. According to the U.S. Supreme Court, a corporate employee holds corporate documents in a representative capacity and cannot claim a personal Fifth Amendment privilege, even if the contents would incriminate the employee.9

The individual target, however, may assert a Fifth Amendment privilege with regard to the act of producing the documents. He or she can assert that the act of production, which is compelled by the subpoena, has testimonial or communicative

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7. *Andersen v. Maryland*, 427 U.S. 463 (1976) (holding that although the Fifth Amendment might protect an individual from complying with a subpoena for the production of his personal records in his possession, because the very act of production might constitute a compulsory authentication of incriminating information, a seizure of the same materials by law enforcement officers, as in this case, differed in a crucial respect, that is, the individual against whom the search was directed was not required to aid in the discovery, production, or authentication of incriminating evidence).
8. *Id.; see also Fisher supra* n. 6.
aspects. For example, a defendant may claim that by compelling him or her as an individual to turn over these possibly incriminating documents, the government is forcing him or her to communicate either that these documents exist or that he or she possesses them. Even just the existence and possession of the documents may be important links in the prosecution's case. The U.S. Supreme Court has recognized the application of the Fifth Amendment privilege with regard to the act of production when it has this testimonial or communicative aspect. A corporate employee, however, cannot claim that the compelled act of producing corporate documents violates his personal Fifth Amendment privilege. Because the corporate employee holds corporate documents in a representative capacity, the employee's act of production is the corporation's act and the corporation has no Fifth Amendment privileges. A person can only claim that his act of production violates the Fifth Amendment when the subpoena demands the individual's personal papers and not corporate documents.

The prosecutor can also use the subpoena power to obtain testimony from uncooperative witnesses. The prosecutor in federal court can even subpoena the target defendant as a witness before the grand jury. The witness has the right against self-incrimination and may refuse to answer any questions. However, if the witness decides to testify, and if the testimony is false, the witness may be prosecuted for perjury.

For the target witness who asserts a Fifth Amendment privilege, the prosecutor may obtain his or her testimony and cooperation by means of a plea bargain. Because a white-collar crime may involve the investigation of multiple targets, the prosecutor can pick one that might have information that would be valuable for prosecuting the other defendants, and offer him or her a plea to a lesser crime or lesser number of counts or charges. Generally, the prosecutor will give the chosen target a sweet deal in exchange for his or her testimony and cooperation. If the particular offer is advantageous to the target individual that person can agree to plead guilty to a lesser offense in exchange for testifying against the other members or the other targets of the investigation.

So if the bargain suits the interests of the prosecution and the interests of the defendant, they will come to an agreement, which is essentially a negotiated bargain. It is negotiated between the prosecutor and the defense counsel and each side assesses the benefits of the bargain and the risks of no bargain. In assessing the value of a possible plea bargain, the defendant considers the risks of conviction at trial versus the certainty of a better deal and the benefit of sentencing concessions due to cooperation.

The prosecutor will try to make deals with "little fish" that will help the prosecutor get the "big fish." Generally, the prosecutor will not give the best deal to the top executives of Enron in order to catch some of the lower officials. Instead, he or she will put the heat on one of the lower officials in Enron: someone who has information about all of the accounting schemes that were used, all of those partnerships that were used to control or hide money, and the strategies to inflate the

11. See California Bankers, supra n. 5; see also Fisher, supra n. 6; see also United States v. Wujkowski, 929 F.2d 981 (4th Cir. 1991).
profits and the net worth of the company. Prosecutors usually start with an insider who can implicate a higher person in the organization, who then can implicate someone even higher. In this way, the prosecutor uses plea bargains in such a way as to infiltrate the organization and find people who can implicate the top people in the organization and those who are the most culpable and most responsible.

Another procedure that is used frequently in the prosecution of white-collar crime is the use of formal immunity. If a witness refuses to testify and no plea bargain seems likely, the prosecutor can compel a witness to testify by granting the witness use immunity. This immunity removes the witness's Fifth Amendment privilege because, according to the U.S. Supreme Court, the prosecutor cannot use the compelled testimony or its fruits against the witness. In the words of the Court, the immunity supplants the privilege. Use immunity does not confer immunity from prosecution, but rather immunity from having the government use the defendant's own words against him or her or any derivative evidence that comes from the words that have been compelled. The federal immunity statute authorizes the prosecutor to obtain and compel the testimony of a witness who refuses to testify based on Fifth Amendment privilege by granting the witness use testimony.

The important aspect about use immunity is that after the immunity is granted to the witness, if the witness then refuses to testify, notwithstanding the immunity grant, the prosecutor can seek an order from the U.S. District Court to order that person to testify. If the witness refuses to testify, the court can hold that witness in contempt. Then, the court can hold that person in jail until that person is willing to testify. Generally the length of that time is either 18 months or until the grand jury is no longer sitting. Even after that time expires, the prosecutor can repeat the process. The prosecutor can again subpoena the witness to testify. If the witness refuses, the prosecutor can get another contempt order, and the process will repeat over again. A vivid example of this process occurred during the Whitewater investigations, where a wife of one of the targets spent more than 18 months in jail for contempt of court for refusing to testify, notwithstanding an immunity grant.

Because use immunity does not immunize the witness from prosecution, but only prohibits the use of his or her testimony, the prosecutor can still prosecute the immunized witness, if it has evidence that is wholly independent of the immunized testimony and not derived from it. Indeed, the U.S. Attorneys Manual prescribes steps for the prosecutors to take to avoid the taint of immunized testimony. Generally, if the prosecutor wants to both prosecute someone and compel his or her testimony, the prosecutor will assemble, before granting immunity and compelling the evidence, all the evidence he or she has against that individual and usually place it in sealed envelope. Because the prosecutor can prove that it had the information before compelling the testimony, the prosecutor can use that evidence in a later prosecution of that witness. The only limitation is that the prosecutor cannot use

15. Id.
any of the compelled testimony to later prosecute the immunized witness. Although immunity allows a prosecutor to obtain the testimony, such testimony does come at a price. The witness is impeachable and his or her credibility can be attacked by the defense as testimony that was bought by the prosecutor.

Another procedure for investigating and prosecuting white-collar crimes is the use of immunity agreements. The prosecutor may enter into a non-prosecution agreement in return for cooperation or testimony. Again, the U.S. Attorneys Manual authorizes such informal agreements, although the Manual states a clear preference for plea bargains or formal immunity over these informal agreements. These agreements are negotiated deals and are enforceable against the prosecutor. Because they are negotiated, they may include whatever terms the prosecutor and the defense agree on. For example, an agreement may include that the person testify before the grand jury and at trial, as well as work with an agent of the Federal Bureau of Investigation to develop a case against other individuals. The agreement may also include terms that the person will not be prosecuted or that the person's testimony will not be used against him or her, essentially like use immunity. These agreements generally provide that if the defendant enters into this informal agreement and later does not comply with the terms of the agreement, then the prosecutor can prosecute that individual for any particular crime.
