

PROSECUTORS**No Word From DOJ When An Investigation Ends: A Proposal for Change**

BY DAVID DEITCH

In most cases, the return of an indictment for a white-collar crime is preceded by a lengthy investigation. In investigating many matters, the government faces few if any deadlines: The statute of limitations is often far off, and there is no other source of urgency for investigators. Taken together with the complexity of some investigations, the result is sometimes an investigation that can continue for years.

In many cases, a client who is the target of that investigation is aware that it is taking place—because agents have executed search warrants on homes and places of business or because investigating agents have spoken to the target or to witnesses who inform the target of those contacts. And in many cases, the client is scared and anxious. How could it be otherwise for someone against whom the government of the United States is bringing to bear its immense power and resources?

The chance that the client will face huge fines and/or a lengthy prison sentence hangs like a dark cloud over

David Deitch, the practice leader for Washington, D.C.-based Ifrah PLLC's Financial Services group, is a former state and federal prosecutor who now represents individuals and companies in criminal investigations and prosecutions, civil enforcement actions by the SEC and other government agencies, and civil litigation over business disputes.

everything the client does while the investigation is pending. In some ways, the client cannot go on with his or her life until after the investigation ends without the filing of any charges.

The problem is that many investigations never seem to end. It is exceedingly common for months or years to pass during which a targeted client—having learned of an investigation—hears absolutely nothing further. Given the secrecy of grand juries and the need to avoid publicizing aspects of some inquiries, it is certainly the case that this silence sometimes does not reflect lack of activity in an investigation. But there are also many cases in which the government determines that an investigation will not result in any charges but provides no notice of this decision either publicly or directly to the targeted client.

In a small portion of investigations the existence of which are publicly known, the government makes an announcement when the investigation ends. For example, the government made a public announcement several months ago when it determined that its investigation into the death of certain detainees in Afghanistan would not result in criminal charges—an investigation that had already received enormous media attention.¹ Likewise, in August, the Department of Justice publicly disclosed that it had determined that it would not bring charges against Goldman Sachs for its conduct during the 2008 financial crisis. Commentators on this statement noted that it was unusual for the government to make such an announcement and that the government's decision to make this public disclosure was the result of pressure by attorneys for the financial services giant.²

But for clients who do not have the political clout of a company like Goldman Sachs or whose case does not have the attention of the public and the Congress, it is far more likely that there will be no disclosure about the end of the investigation, whether directly to the client or

¹ See <http://abcnews.go.com/Blotter/doj-charges-cia-detainee-death-investigations/story?id=17119715#.UGsHqmPya4M>.

² See, e.g., <http://dealbook.nytimes.com/2012/08/10/justice-department-closes-investigation-of-goldman/>.

in a public announcement. For these clients, the only publicly available information may be the buzz on the internet that resulted from the initial disclosure of the investigation—information that remains available and easily accessible for years regardless of whether the investigation determined that there was any wrongdoing.

While there are valid bases for the confidentiality of how the government handles its investigations, the general practice of failing (or declining) to disclose the closing of an investigation without the filing of any charges has long-lasting and far-reaching consequences for those who are targeted by federal criminal investigations.

Investigations That Simply Don't End

Two years ago, the principal of one of my clients was interviewed by a federal prosecutor and an agent from the FBI about criminal conduct in which his company was suspected of participating. At the end of the debriefing, the agent and the prosecutor warned of dire consequences if he did not admit he was lying and confess to the criminal conduct that was the focus of the investigation. In the two years that have elapsed, the only development is that the prosecutor has left DOJ and the lawyer with current responsibility for the matter has no apparent interest in pursuing the matter. Indeed, when counsel for another company involved in the investigation spoke with the departed prosecutor, he was told that there was nothing to worry about but that, as a rule, his former office did not notify targets of investigations when a decision has been made to decline to prosecute.

This is not uncommon. Most practitioners with experience in dealing with federal white collar criminal investigations can relate similar stories about a client who has learned—sometimes in a very unpleasant and very public way—that he or she is under investigation but never hear from the government whether and/or when the investigation terminated with a decision not to bring any criminal charges.

What Can Counsel Do?

The obvious question—and one that clients routinely ask in these circumstances—is what defense counsel can do to force the government to give notice if it has reached the point at which it has either declined to prosecute or simply has no intention to proceed further with the investigation. The short answer is “not much.” The government is necessarily entrusted with broad discretion in how it conducts criminal investigations, and the courts are reluctant to intrude on the exercise of that discretion in the absence of flagrant abuses.

As things now stand, the only recourse may be to try to persuade federal prosecutors that it is the right thing to do. The United States Attorneys' Manual specifically addresses the policy of DOJ regarding notices provided to targets of investigations and the extent to which fed-

eral prosecutors should and/or may disclose information about pending investigations. In Title 9, Chapter 11, the USAM states: “The United States Attorney has the discretion to notify an individual, who has been the target of an grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office.”³

Notwithstanding that grant of discretion, the USAM notes that “discontinuation of target status may be appropriate” under certain specified circumstances:

- the target previously has been notified by the government that he or she was a target of the investigation; and

- the criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.⁴

The USAM notes that there may be other circumstances when notice is appropriate and offers as an example the situation in which “government action has resulted in public knowledge of the investigation.”⁵

On the other hand, the USAM makes clear that federal prosecutors have virtually unfettered discretion to give no such notice, even in response to a request from counsel. The manual notes that the U.S. attorney may decline to do so “if the notification would adversely affect the integrity of the investigation or the grand jury process”—a perfectly reasonable justification. But the USAM also permits a refusal to give notice “for other appropriate reasons” without giving any further definition of what other reasons would be “appropriate.” And to top it off, the manual states unequivocally that “no explanation need be provided for declining such a request.”⁶

These guidelines provide a rule-based framework that supports the historical practice of federal prosecutors to decline to give notice to targets or by public announcement when the government has determined that it will not pursue criminal charges based on a pending investigation. Thus, while U.S. Attorney's Offices are permitted to issue press releases that provide for wide publication of allegations against criminal defendants, those same offices have no obligation to make clear when they have determined that a person whose criminal liability was suggested by the existence of an investigation has not, in fact, committed any provable crime.

In circumstances in which the client is neither a large, powerful corporation nor part of a highly publicized investigation, the only basis on which counsel may persuade prosecutors to disclose the closing of an

³ See United States Attorneys' Manual 9-11.155, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcr.htm#9-11.155.

⁴ Id.

⁵ Id.

⁶ Id.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

investigation may be an appeal to fairness. The challenge here is that many prosecutors have never dealt with individual clients—particularly those lawyers who have not worked in private practice or whose private practice experience is limited to big firms where they represented mostly large companies. Counsel need to find creative ways to communicate to prosecutors the harms suffered by someone who is publicly identified as the target of an investigation when the investigation ends without any disclosure that the individual will not be charged with any crime.

Of course, while options are somewhat limited in cases in which the government has made a decision not to pursue charges, an even harder circumstance is the one in which the government asserts that it has not terminated its investigation. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations provides some guidance, stating, "General crimes investigations . . . shall be terminated when all logical leads have been exhausted and no legitimate law enforcement interest justifies their continuance."⁷ Nevertheless, the government enjoys a great deal of discretion as to when to terminate an investigation, and targets of investigations are unlikely to persuade a court to override the stated judgment of government prosecutors that there is still a basis on which to continue an investigation.

In addition, if the government has not terminated its investigation, that means that there is still a risk for the client that the investigation may yield criminal charges. It is not uncommon for clients to ask me to contact a

prosecutor to determine the status of the investigation. In almost all cases, like many other attorneys, I suggest to the client that it is better to "let a sleeping dog lie." If I call the prosecutor about the client's case, will that prompt the prosecutor to take action on a matter that has fallen through the cracks? If so, hasn't that call been counterproductive? Yet, without my call, the client remains in the dark as to the status and expected result of the investigation.

A Proposal for Change

One solution to this quandary would be a change in DOJ's policies and procedures relating to investigations. In a previously disclosed investigation as to which a prosecutor no longer has a good-faith basis to believe there will be further investigative efforts, the government should be required to inform the targets of that investigation (either directly or through a public announcement) that the investigation has been terminated. In a case in which an investigation ends without the filing of any charges, it is difficult to imagine any threat to law enforcement interests that would result from such a disclosure (and a rule could certainly be written to accommodate a very narrow exception for that purpose). Such a rule would bring closure to a client who is the focus of a now-terminated investigation, and it would allow the mix of information available on the internet to reflect the result of an investigation that may have begun with substantial buzz about the presumed guilt of the person under investigation.

It is often said that public prosecutors' goal should be the discovery of the truth. Perhaps this is a procedure that may allow that truth to be more effectively disseminated in cases in which investigations do not result in any criminal charges.

⁷ See <http://www.justice.gov/ag/readingroom/generalcrimea.htm#general>.