# When the Government Knocks

By Raymond M. Brown

A government agent knocks at the door. He quickly launches into a series of questions about the occupant's business. He wants to talk about taxes, compliance with OSHA or any one of a score of unpleasant subjects. What should the business owner do? Surprisingly, the most important entrepreneurial skill at such a moment is a properly honed state of awareness.

Business owners sometimes underestimate the dangers and aggravation that can flow from unanticipated government investigations. ("Aggravation" can be almost as vexing as legal consequences.

Citigroup's Sandy Weill says he lost 35 pounds on the "Spitzer diet" during a nine month inquiry in 2002 by New York's Attorney General Elliot Spitzer who brought no charges!) Among those who suffer most grievously are the business owners who forget two cardinal principles that can foster the proper awareness: preparation, and an early call to legal counsel.

When reminded of these principles entrepreneurs often as ask how a business can prepare for an investigation that it does not expect.

The first step is to be conscious of the increased vigor with which Government agencies at all levels have increased their scrutiny of businesses large and small since the Enron scandal of 2001. (A recent study concluded that small businesses have been among the most often prosecuted, and one third of those businesses had fewer than 10 employees.)

The Federal Government has issued guidelines telling investigators how to pursue businesses more vigorously and warning the business community of its intentions. It has urged agencies to work more closely together, sought to compel businesses to cooperate in investigations of their own alleged wrongdoing, and encouraged the examination of wide ranges of a business' compliance practices once an inquiry has begun.

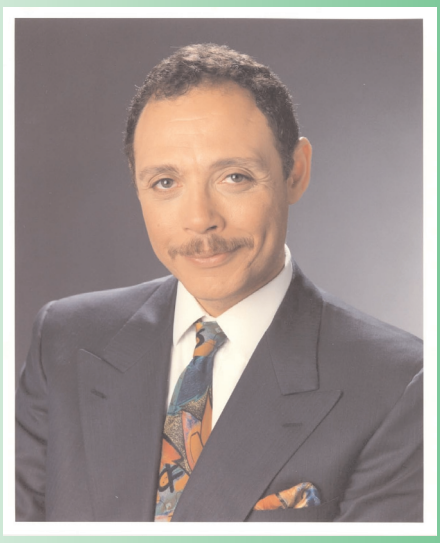
An investigation could begin with an OSHA inquiry and evolve into a tax audit or DEP review.

This possibility highlights the second step a business can take to prepare for the unanticipated investigation; undertake a compliance audit. This can be started simply by addressing those nagging problems lurking in the back of the owner's mind (unpaid withholding taxes, unremitted sales taxes, compliance with straightforward OSHA or DEP regulations.)

After taking stock, some of these problems will yield to an assault on denial and the administration of a dose of self help. Others are best attacked with professional help from accountants, engineers, lawyers, among others.

This option can mean spending money, but as Stanley Sporkin, former Federal Judge, SEC enforcement chief and CIA counsel said recently "The cost of an investigation and prosecution will buy you a lot of compliance." This process is important because the government has announced that it will deal more severely with businesses that are out of compliance in more than one area.

However, even the most rigorous compliance scheme is not a guarantee that a business will be free of government scrutiny. Therefore, it is critical that when a government agent knocks at the door that matters are handled in a way that maximizes the chance of good result and minimizes the chance of serious civil consequences or even criminal charges.



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The most important step after the knock is to summon legal counsel before talking to the agent.

Owners should disregard the noisome thought that the agent will think something is wrong simply because counsel is called. Despite the television inspired fear of being treated badly for "lawyering up," no one is treated more severely merely for calling counsel.

One reason for this early call to counsel is to avoid the dilemma of either admitting that a problem exists or inadvertently (or deliberately) misleading investigators, or opening the door to obstruction or false statement charges.

Counsel can also help a businessperson decide whether there are documents, facts, or conversations to which privileges attach.

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This has become a critical area of concern because the most controversial post-Enron government guideline, the Thompson Memorandum, ("Principles of Federal Prosecution of Business Organizations") directed prosecutors to demand that businesses give up (waive) their own privileges and even those of their employees as a condition of lenient treatment. Three years of protest by many groups including the American Bar Association, the US Chamber of Commerce, at least one Federal Judge and a bipartisan collection of Senators, Congressmen and former Attorneys General has caused the government to grudgingly amend the Thompson Memorandum. Nonetheless many observers remain skeptical of the revisions in the new guidelines released in December 2006 (The Mcnulty Memorandum).

This admonition to call counsel at the first knock on the door returns us to the beginning of our discussion, consciousness and preparation. In truth, counsel will be much more effective if the business owner has had the foresight to establish a relationship with a lawyer before investigators arrive. More is accomplished in discussions of compliance and handling investigations conducted in a relatively relaxed atmosphere before a crisis. While there may be natural disinclination to explore these issues where no emergent circumstances exist, it is much more likely since Enron that the knock will eventually come to the doors of most entrepreneurs.