

WHITE COLLAR OR BLUE: CRIME IS CRIME

From Enron to Bernie Madoff, high-profile white-collar crimes have attracted significant media attention in recent years. Here in Thailand, the case of Rakesh Saxena has resurfaced in the headlines after his extradition from Canada, and he is now awaiting trial on charges of embezzling funds from the Bangkok Bank of Commerce in the mid-1990s. Why this intense public interest in white-collar crime? Some would argue that this form of crime actually causes greater damage to the injured party than many traditional crimes. White-collar crimes also present unique difficulties in terms of both detection and recovery of the losses incurred, which can often be massive.

White-collar crime: *Black's Law Dictionary, Seventh Edition* defines white-collar crime as "a nonviolent crime usually involving cheating or dishonesty in commercial matters. Examples include fraud, embezzlement, bribery and insider trading." Building on this concept, *Merriam-Webster's Dictionary of Law* specifies that white-collar crimes are "committed by salaried professional workers or persons in business".

The latter definition implies that the wrongdoer is usually operating at the management level of an organisation, which may include the CEO, CFO or other top executives. A further implication is that such crimes involve elaborate planning prior to execution. Clearly, this presents an enormous challenge for law enforcement authorities, who are often one step behind the crime. The later such crimes are discovered, the greater the damage caused.

Barriers to success: It is widely recognised that the procedures and sanctions that have traditionally been available under Thai criminal laws, such as the Penal Code, are not sufficient to control white-collar crime. For example, the offences of fraud, misappropriation and cheating creditors are deemed to be compoundable offences. Essentially,

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this means that the injured person is entitled to seek a compromise with the alleged offender in order to arrive at a mutually acceptable resolution. Because these crimes are compoundable offences, the law requires the injured person to lodge a complaint to the police or file a criminal suit in court within three months from the day when the offence and the offender became known to him or her. Failure to file charges within this time period will result in the dismissal of the case. This is a frequent barrier for injured persons, as otherwise legitimate claims can become barred by the time limitation.

Another barrier in prosecution is that the form or structure of white-collar crime is normally more complicated than other forms of crime. The intricate planning involved in concealing these crimes may be difficult for police to penetrate, especially given the technological and other resources required. The case of Mr Saxena, for example, still remains pending trial almost 15 years after his alleged crime.

New measures in place: In an attempt to deal with these challenges and suppress white-collar crime, Thailand took a major step forward with the creation of the Department of Special Investigation (DSI) in 2002. Armed with high-tech equipment and knowledgeable manpower, the DSI is tasked with handling special cases relating to public fraud, tax avoidance, international crime and related matters.

In addition to the formation of the DSI, new provisions have been introduced in several laws to help control such crimes, including the Securities and Exchange Act, the Customs Act, the

Public Limited Companies Act and the Trade Secrets Act. For instance, the Penal Code categorises fraud as a compoundable offence, but the same offence is treated differently under the Securities and Exchange Act. Importantly, the punishment for an offence under the specific statute is more serious than the same punishment under the general law.

These new laws and amendments also implement important new legal concepts that will facilitate actions against white-collar crime. For example, certain actions shall be deemed to be an offence, irrespective of the existence or nonexistence of any wilful intent or negligence (Section 16 of the Customs Act). Additionally, managing directors, managing partners or other responsible persons may be deemed criminally liable for the actions of their companies, unless it can be proven that the offence was committed without their knowledge or consent or they have acted reasonably in preventing such offence (Customs Act, Public Limited Companies Act, etc.). That is, these senior officers will be presumed guilty, and will be required to prove their innocence.

Given the potential for stiff penalties under these laws, it is essential that companies and their management personnel keep themselves up to date on the evolving legal framework. Procedures must be put in place to mitigate the potential liability stemming from white-collar crime. Good faith alone may be not sufficient to shield a company and its management from criminal liability under the strict liability or presumed-guilty concept.

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