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Day Pitney White Collar Roundup - June 2022 Edition

Foreign Agent Suit Against Domestic Celebrity Raises New Questions

The Foreign Agents Registration Act, 22 U.S.C. §§ 611-21 (FARA), is intended to ensure that when foreign governments undertake to influence the United States government or the public through a proxy, the relationship is known to the government and to the public. Originally focused on combating Nazis and Communists, the statute lay little used in the years following the fall of the Soviet Union, but the last decade has seen its increasing use.

Until recently, the risks of not complying with FARA have been largely associated with criminal prosecutions. But more recently, the Department of Justice (DOJ) has employed a different tool, namely, the statute also permits a civil action to compel compliance. In *Attorney General of the United States v. Stephen A. Wynn*, 1:22-CV-01372 (D.D.C.), the government seeks injunctive relief in a complaint that reads a bit like a criminal indictment.

The government alleges that Stephen Wynn, well-known hotel and gambling magnate and former Republican National Committee finance chairman, acted as an agent ("at the order, request, or under the direction or control") of the vice minister for public security of the People's Republic of China (the PRC), in repeatedly lobbying the U.S. government to arrange for the return from the United States of a Chinese national wanted by the PRC. Although not identified in the complaint, the Chinese national has been reported to be Guo Wengui, who figured in similar allegations against Elliott Broidy, a major Republican donor, who recently pleaded guilty to criminal violations of FARA. The civil complaint against Wynn alleges that Broidy served as an intermediary between representatives of the PRC and Wynn. The lobbying effort failed, but not for want of trying; according to the complaint, Wynn repeatedly reached out to then-President Trump and others on the issue.

After the effort ended, the DOJ advised Wynn that he had failed to register as an agent and was obligated to do so, and allowed him to register within 30 days. Wynn, represented by counsel, responded by asserting he was not obligated to register. The DOJ disagreed, and again advised Wynn he was required to do so. He did not, and rather than prosecute criminally, the DOJ initiated a civil suit.

The DOJ's decision to sue civilly under FARA is rare, and given how infrequently the civil remedy has been used by the department, the case should present some interesting issues. Can the defendant answer the complaint without risking exposure to criminal liability? Will the matter be decided (at least initially) on a motion to dismiss, allowing the presiding judge to discuss in detail the scope and nature of the registration requirements? These and other questions remain unclear—so watch this space for developments.

Massive Settlement Marks End of Market Manipulation Saga

The DOJ announced in late May that Glencore International A.G. and Glencore Ltd.—companies that make up a multinational commodity trading and mining firm based in Switzerland—pleaded guilty to resolve the government's investigations into violations of the Foreign Corrupt Practices Act (FCPA) and a commodity price manipulation scheme. The total amount Glencore agreed to pay to resolve the investigations exceeded a staggering $1.1 billion.

The investigation into Glencore's malfeasance was part of a multinational effort among the United States, the United Kingdom and Brazil. According to the Organized Crime and Corruption Reporting Project, the U.K.'s probe, conducted by the Serious Fraud Office (the U.K.'s top authority handling serious fraud, bribery and corruption), was executed in tandem with Dutch and Swiss prosecutors.

With respect to the FCPA violations, including according to the government's court filings in the Southern District of New York, Glencore engaged in a wide-ranging scheme over the course of a decade to pay more than $100 million to agents and intermediaries in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela and the Democratic Republic of the Congo, with the funds intended to be used as bribes for local officials. These payments were made through a series of sham consulting agreements, inflated invoices and intermediary companies. Glencore pleaded guilty to one count of conspiracy to violate the FCPA, and agreed to a criminal fine of $428,521,173 and criminal forfeiture and disgorgement of $272,185,792. Its plea agreement provides for a credit of nearly $256 million in payments that the company will make under parallel resolutions with the Commodities Futures Trading Commission (CFTC), the Serious Fraud Office and authorities in Switzerland (in the event that the company reaches a resolution with Swiss authorities in a year).

The commodity price manipulation case, including according to pleadings filed in the District of Connecticut, was based on Glencore Ltd.'s manipulation of two benchmark price assessments for fuel oil products, specifically two in the Port of Los Angeles and the Port of Houston, two of the largest and busiest ports in the United States. As part of the conspiracy, company employees sought to enrich themselves and the company by illegally reducing costs on certain contracts and purposefully trading during certain daily "windows" related to the price assessments, with the intent to artificially drive the price up or down.

In a statement about the resolution, Glencore announced that it would take significant steps to enhance its ethics and compliance program. While the statement described the company's cooperation with the various investigative agencies, DOJ noted in its release that Glencore did not receive full cooperation credit, given DOJ's view that the company "was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct." On Glencore's remedial measures, DOJ continued that it believed some of the company's compliance enhancements had "not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future," thus necessitating an independent compliance monitor for the next three years.

The resolution marks a considerable success for the DOJ and other domestic agencies including the FBI and the CFTC. It also symbolizes successful cooperation efforts among American law enforcement and their international counterparts. Finally, given the more than $1.1 billion price tag, it should serve as a powerful catalyst to both domestic and multinational firms to ensure their anti-corruption houses are in good working order.

Yours, Mine and Ours: Defining Novel Crypto Products Under Older Securities Standards

Amid the ongoing volatility in the cryptocurrency markets, a case testing the limits of the scope of securities regulations over cryptocurrency is headed for a new trial. In early June, U.S. District Judge Michael P. Shea of the District of Connecticut granted in part the plaintiffs' motion for a new trial in the case ***Audet v. Fraser,*** No. 3:16-cv-940 (MPS). The defendant in *Audet*, the operator of a cryptocurrency mining firm, was sued by a class of plaintiff customers who alleged the defendant had engaged in a Ponzi scheme; their complaint alleged multiple counts of the sale of unregistered securities in violation of state and federal securities statutes, as well as common law fraud. At trial, the jury heard evidence regarding several products offered by the defendant that ranged from cryptocurrency tokens (known as "Paycoins") to a novel product called "Hashlets" that offered investors the opportunity to purchase rights to a fractional share of the output (or "mining power") of cryptocurrency mining equipment. The jury heard further evidence regarding additional products known as "Hashpoints" that

were said to operate as a sort of "in-house credit" exchanged for customers' "Hashlet" mining activities, and "HashStakers," which functioned similarly to "certificate[s] of deposit" redeemable for Paycoins.

The court instructed the jury on the application of the test to determine whether the products at issue were securities under *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946) by asking "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." At trial, the plaintiffs contended that each of the products at issue, including those alleged to represent mining power, were in fact investment contracts subject to securities regulation. The defendants asserted that the products did not meet the legal standard for regulated securities, primarily because the investment returns received by customers were determined by their own selections regarding the mining power individually available to each customer. Under the defendant's formulation, each customer's profits were derived from their own mining decisions and were thus independent of other customers' profits, failing the "common enterprise" and "efforts of others" tests under *Howey*.

The jury sided with the defendant that each of the products at issue was *not* a security, prompting the plaintiffs' motions for judgment as a matter of law and a new trial. In his decision, Judge Shea denied plaintiffs' post-verdict motions on all counts *except* those related to Paycoins, for which he found the jury's findings to be against the weight of the evidence and ordered a new trial accordingly. Judge Shea explained that the jury could have reasonably determined that the novel products held out by defendants as fractional "mining power" (Hashlets), "in-house credit" (Hashpoints) and "certificate[s] of deposit" (HashStakers) were not securities under the *Howey* test. However, the same could not be said for the jury's verdict on Paycoins, which according to the weight of the evidence functioned much more like a traditional investment vehicle because purchasers reasonably expected profits based on the market activities of others, including the activities of other Paycoin purchasers and the defendant, who had promised substantial efforts to cause Paycoin's widespread adoption.

As cryptocurrency businesses struggle in the recent market downturn, we can expect to see many more cases like *Audet* in the coming years. Regulators, including the Securities and Exchange Commission, have only recently been communicating their intentions regarding early generations of crypto products and exchange platforms. Continued innovation in the cryptocurrency space is all but certain to increase the technical complexity of subsequent products, substantially increasing the burden on both regulators and finders of fact. If *Audet* is any indication, both of them (not to mention investors) are likely to continue to define how to handle novel products that do not comfortably fit established definitions under existing securities regulations.

Government Brings Full Court Press to NBA Case

Following up on a wave of initial arrests late last year, the DOJ more recently charged a former National Basketball Association (NBA) player, along with a doctor and a dentist, with conspiracy to commit healthcare fraud in connection with a broader scheme involving more than 15 former players and other participants. The government alleges the scheme cost the NBA's health and welfare benefit plan more than $5 million.

Keyon Dooling, a retired NBA point guard who has been suspended as an assistant coach for the Utah Jazz, is alleged both to have directly participated in and recruited other players to join the healthcare scheme. As alleged in a superseding indictment, Dooling and others submitted fraudulent claims to get reimbursement for medical and dental expenses they did not actually incur by submitting false invoices to the health plan and also supplied false invoices to other players. In one text message highlighted by the DOJ, Dooling exhorted one provider, "let's make this thing grow sir," to which the dentist responded "LoL I'm down bro. Get me the whole NBA."

Dooling and the other defendants are charged with conspiracy to commit healthcare fraud and wire fraud, which carries a maximum sentence of 20 years' imprisonment. He and the other players have pleaded not guilty, and the government's

investigation is ongoing. Last week, one of the medical providers involved in making the fraudulent healthcare invoices agreed to plead guilty to the conspiracy in the Southern District of New York. As for the former players, like a shot clock that inevitably ticks down to zero, the final disposition of their cases will soon enough be seen.

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