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White Collar Roundup - June 2015

The Pressure of Cooperation

The month of May saw the culmination of a long-awaited investigation into a cheating scandal at the heart of a multibillion-dollar industry that resulted in record-breaking sanctions for, among other things, failures to be fully candid during the investigation. We refer, of course, to the "Deflategate" scandal and the investigation by the National Football League (NFL) into allegations that the Super Bowl Champion New England Patriots deflated footballs below regulation pressure in the penultimate game before the 2015 Super Bowl. In addition to fines and significant forfeitures, the Patriots will lose star quarterback Tom Brady's services for the first four games this year and Brady was fined $2 million. The severity of these sanctions stems from a failure "to cooperate fully with the investigation." While the details of this particular investigation may escape the attention of many legal observers, the report's language and its justification for the severity of the penalties should be familiar. Indeed, speaking in May at the New York City Bar's Fourth Annual White Collar Crime Institute in Manhattan, Assistant Attorney General Leslie R. Caldwell of the U.S. Department of Justice (DOJ) sounded a similar theme. Caldwell stressed that those looking to receive credit for cooperation cannot engage in "half measures" and must disclose "relevant information...in a timely fashion." Not cooperating fully is a surefire path to harsher treatment by the DOJ and, apparently, the NFL as well.

Warrantless Laptop-Search Smackdown

Two courts recently suppressed the fruits of warrantless searches of laptop computers. First, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Lichtenberger* affirmed the suppression of evidence of possession of child pornography found on a laptop. In that case, the girlfriend of the defendant hacked into his computer and found a few images of what she thought were child pornography in various subfolders within a folder, named "private." She phoned the authorities, who came to the residence. There, the officer directed her to show him more subfolders on the laptop than she had seen. The court held that such a search, which was more expansive than the private search she had conducted, required a warrant. Second, the U.S. District Court for the District of Columbia in *United States v. Kim* suppressed evidence found on a laptop that was seized from the defendant when he was leaving the United States from Los Angeles International Airport. In that case, the Department of Homeland Security had obtained information that the defendant was involved in shipping controlled articles to Iran. The agents seized the laptop before permitting the defendant to board his flight and sent it to a forensic lab, which conducted a keyword search, burned the results of the search on a DVD and sent the DVD to the case agent. The agent found incriminating e-mails and used them as a basis to obtain a warrant to search the entire contents of the hard drive. The court held that the initial search required a warrant and suppressed the evidence.

Hard-Charging Regulator Moving On

Benjamin Lawsky, the head of the New York Department of Financial Services, is stepping down. The department was created by New York Governor Andrew Cuomo in the wake of the financial crisis. Its mandate was to better regulate Wall Street. Lawsky turned the new department into a force to be reckoned with. Under his leadership, the department brought enforcement actions against several Wall Street firms, often obtaining high-dollar settlements. (To no apparent avail if the following report is to be believed.) To read more, click here.

Still Misbehavin'

It appears from a report regarding the financial services industry that many Wall Street professionals aren't following the rules. According to a *New York Times* article, many financial services professionals claim they "have witnessed or have

firsthand knowledge of wrongdoing in the workplace." And many claim their jobs require them to "engage in unethical or illegal activity to be successful." Many claim to feel pressure "to compromise ethical standards or violate the law"?- all this despite highly publicized enforcement actions, fines and prison sentences.

Restricting Travel During Pretrial Release

When white-collar defendants are on pretrial release, they often are required to remain within a certain geography and may travel outside that geography only with court permission. Such is the requirement for former Massey Energy CEO Don Blankenship, who must stay within the Southern District of West Virginia; Pike County, Kentucky; and Washington, D.C., to meet with counsel. Blankenship requested permission to "travel home to Nevada during the Memorial Day holiday." The prosecutors opposed the request, arguing Blankenship did not own a home in Nevada. The magistrate judge noted that defendants on bond are "very rarely permitted travel beyond the geographic territory authorized initially" and in any event only "for a very brief period of time and under stringent conditions of supervision when it appears that a defendant has unexpectedly experienced hardship or emergency circumstances." Finding those circumstances lacking, the magistrate judge denied the request. The lesson: Make sure to include any likely destination in the initial release order. For more, click here.

Effective Compliance Programs: More Than Just Checking the Box

Assistant Attorney General Caldwell discussed the hallmarks of an effective compliance program at the Compliance Week Conference. Caldwell focused on "designing compliance programs that don't just look good on paper but actually work." Describing compliance policies and departments as "the first lines of defense against fraud, abuse and corruption," Caldwell explained that "effective compliance programs are those that are tailored to the unique needs, risks and structure of each business or industry." She warned that most compliance programs suffer from being "too often behind the curve, effectively guarding against yesterday's corporate problem but failing to identify and prevent tomorrow's scandals." After relaying DOJ's views on effective compliance programs, she further explained how to maximize their usefulness. To read the speech, click here.

Nowhere to Sit When the Music Stops

The Second Circuit reinstated the conviction of a low-level employee, Irene Santiago, who had pleaded guilty for lying to investigators and the grand jury in connection with the so-called Squawk Box case. That prosecution resulted in convictions for several participants in the alleged scheme, including many defendants with more extensive involvement than Santiago's. But on appeal, the Second Circuit vacated those convictions because of purported *Brady* violations. Upon remand, the government opted against a retrial, and the defendants entered into deferred-prosecution agreements. Subsequently, Santiago sought a writ of error coram nobis to vacate her own conviction. The district court granted the writ, but on appeal, the Second Circuit reversed, reinstating the conviction in a summary order. The reason: The writ "is strictly limited to those cases in which errors . . . of the most fundamental character have rendered the [challenged criminal] proceeding...irregular and invalid." And this, as they say, is not that. The result: Santiago remains a felon, and her superiors (whose convictions for perpetrating the scheme she lied about were vacated) do not. The case is *United States v. Santiago*.

Pressing the Government on Fraud Conviction Appeal

A panel of the Second Circuit expressed skepticism about some of the district court's rulings in *United States v. Litvak*, which resulted in a jury trial and conviction in the District of Connecticut. The underlying case related to misstatements made by defendant Jesse Litvak?- a bond trader at Jefferies & Co. Inc.?- during the course of his work. Litvak was convicted at trial but appealed that conviction, arguing that the district court had improperly excluded expert testimony that Litvak's conduct was common in the industry and that industry professionals would not have found his misstatements to be material. The court took the case under advisement and will issue an opinion in the coming months. For insight into the argument, click here.

We Want Your Feedback!

Send us your thoughts about the *White Collar Roundup*. What do you like? What don't you like? What would you like to see more or less of? E-mail feedback to dwenner@daypitney.com. Thanks!