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White Collar Roundup - May 2018

Government Requests to Microsoft Plummet—but for How Long?

As we have previously reported, beginning two years ago, Microsoft successfully challenged prosecutors' authority to obtain orders from U.S. courts requiring internet service providers (ISPs) to disclose data stored abroad. Moreover, this past March, when the Supreme Court appeared on the verge of ruling for Microsoft, Congress amended the Stored Communications Act (SCA) to authorize extraterritorial orders to disclose data. Such orders are subject to a new express right of ISPs like Microsoft to move to quash if the order is at odds with the privacy laws of the nation where the data reposes. Now, Microsoft has released data that suggests its resistance over the past two years may have deterred the U.S. and other governments from seeking disclosure from Microsoft, and that reveals commensurate increases in requests of its competitors. In 2017, Microsoft received 48,306 such requests from governments around the globe. That's a 35 percent drop from the 74,311 requests in 2015. By contrast, Google and Apple each reported receiving a record number of such requests in 2017, including, in the second half of 2017, 48,941 such requests to Google and 30,184 to Apple. It bears watching whether these trend lines hold up. With the resolution of Microsoft's challenge to the SCA, requests of the company may revert to higher volumes. Moreover, with the revamping of the SCA to permit motions to quash orders to disclose overseas data, an ISP may look to see whether making such motions later correlates with subsequent reductions in new requests.

Two Arrests Made in Tax Evasion Case Alleging $5.3 Million Stolen from New York Religious Institution

As announced here, two leaders of the Israelite Church of God in Jesus Christ (ICGJC) were arrested on April 25, for allegedly evading taxes on millions of dollars in income. According to the indictment, Jermaine Grant and Lincoln Warrington diverted approximately $2.4 million in ICGJC funds into a shell entertainment company and concealed that income. Additionally, Grant allegedly used an ICGJC debit card to fund a lavish lifestyle, including purchases of home furnishings, designer clothes, real estate, high-end vehicles, private school and vacations. The indictment alleges that together the defendants failed to report over $5.3 million in income funneled through the ICGJC, which resulted in a tax loss to the government of over $1.9 million.

Loss Amount in the GWB Scandal Now Questioned

Oral argument relating to the George Washington Bridge scandal led to more questions for prosecutors. The U.S. Court of Appeals for the Third Circuit asked prosecutors to submit a brief setting forth the trial evidence demonstrating the value of agency property that had been misapplied in the scandal. Defendants Bridget Anne Kelly and William E. Baroni Jr. were convicted in November 2016 of intentionally misapplying agency property valued at $5,000 or more in violation of 18 U.S.C. § 666. The appellants, Kelly and Baroni, argued that the threshold amount had not been met at trial. The government's brief was due May 2, and the appellant's joint brief is due May 9. To listen to the oral argument, click here.

Mysterious D.C. "Sting-Rays" and the Ongoing Surveillance Debate

Over the past several years, there has been increasing debate within the U.S. about law enforcement use—with or without a warrant—of "Sting-Rays" and other cell-site emulators. As we have discussed on other occasions (e.g., here and here) a cell-site emulator raises privacy concerns because it impersonates the cell tower of a user's carrier, tricking a target phone to disclose its unique numeric identifier and, through the use of signal triangulation, its precise location. Over the past several months, the continuing debate over these emulators and their increasing use has taken an unusual turn. Privacy advocates have drawn attention to evidence suggesting that foreign spies (among others) are operating the devices in and around the U.S. Capitol. As reported by the Associated Press and *Newsweek*, in late 2017, Congressman Ron Wyden, D-Ore., wrote to

the U.S. Department of Homeland Security (DHS) inquiring if it could detect emulators, including "foreign" cell-site emulators, in the Capitol region. In late March 2018, DHS responded. The agency confirmed that it had "observed anomalous activity" in the region that was "consistent" with emulator use. The agency stated, however, that it was not even aware of whether it possessed the "technical capability" to detect emulators. On April 18, Representative Wyden and other legislators urged the agency to disclose additional information about emulator activity in the Capitol area, emphasizing the legitimate public interest in "understanding the extent to which U.S. telephone networks are vulnerable to surveillance," particularly by "hostile actors." It remains to be seen whether public discussion (or the legislators) will stay focused exclusively on foreign agents operating these intrusive devices.

Tax Obstruction Count Falters

A criminal tax case in the Southern District of New York, which has intermittently been under investigation since 2010, appears finally to be headed toward disposition. It heads that way, however, minus an obstruction count that the government had pursued to punish the defendant's prolonged withholding of evidence that she had banked a large inheritance in Europe. On April 19, District Judge Andrew L. Carter Jr. granted the motion of defendant Lacy Doyle to preclude the government from offering two categories of evidence key to the obstruction count. The first category was evidence of Doyle's failure in each of her federal tax returns from 2010–2015 to disclose whether or not she maintained funds in foreign accounts. Judge Carter rejected the prosecutors' proposal to redact the Fifth Amendment invocation that Doyle had included in those returns. According to the court, the redaction would not cure the Fifth Amendment issue because "the prosecution would be asking the jury to infer guilt by use of this blank space, which, besides being incomplete and misleading, is the documentary equivalent of the Defendant's silence," as the Fifth Amendment forbids. The second category is related to Doyle's resistance to producing bank documents from Europe. (Notably, she had been found in contempt and her then-counsel had also purportedly misrepresented facts.) Judge Carter precluded evidence of the defendant's unavailing privilege claims because the government had failed to show the claims had been asserted in bad faith. Days later, the government announced that it was considering dropping the obstruction count. A few days after that, the parties informed the court that they were in the final stages of negotiating a guilty plea.

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