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White Collar Roundup - May 2016

DOJ Announces FCPA Pilot Program

The DOJ announced a one-year pilot program to handsomely reward companies that self-report violations of the Foreign Corrupt Practices Act. The program is detailed in "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance." In announcing the program, Assistant Attorney General Leslie R. Caldwell described the increased resources and personnel at the DOJ tasked with investigating and prosecuting FCPA violations, which increase "should send a powerful message that FCPA violations that might have gone uncovered in the past are now more likely to come to light." The pilot program "is designed to motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs." Caldwell also made clear that any disclosure would make the company eligible for a "reduction of up to 50 percent below the low end of the applicable U.S. Sentencing Guidelines fine range, and generally will not require appointment of a monitor." Further, the DOJ will "consider a declination of prosecution." But self-disclosure will not result in any reprieve for the individual wrongdoers, whom the DOJ will still prosecute to the fullest extent of the law, as described in the so-called Yates memo. Caldwell also warned that just as companies will receive a benefit for self-reporting, "[i]f a company opts not to self-disclose, it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome than if the company had voluntarily disclosed the conduct to us and cooperated in our investigation."

District Court Can't Stop a Deferred-Prosecution Agreement

The government often enters into deferred-prosecution agreements (DPAs) with companies to allow them time to demonstrate that they have remediated the problems that led to their indictment. When the government indicts a defendant, the Speedy Trial Act requires that the trial begin within 70 nonexcludable days from the filing of the indictment. To allow the defendant "to demonstrate his good conduct," the act allows the exclusion of time "with the approval of the court." 18 U.S.C. § 3161(h)(2). The U.S. Court of Appeals for the D.C. Circuit in *United States v. Fokker Services B.V.* held that the district court cannot use its "approval" as leverage to second-guess the terms of a DPA. The prosecution arose from Fokker's self-disclosure of a violation of the International Emergency Economic Powers Act, which prohibits the exporting of certain technologies to certain countries, such as Iran. The DOJ and Fokker agreed to the terms of a DPA, which the DOJ filed in district court. District Judge Richard J. Leon refused to give his approval because he thought the terms were too lenient and the government had not prosecuted any individual wrongdoers. The government sought a writ of mandamus from the D.C. Circuit. That court noted that "[w]hile the exclusion of time is subject to 'the approval of the court,' there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions." As a result, it issued the writ, directing the district court to exclude time during the pendency of the DPA.

Disgorgement Order Reaches Spouse's Assets

Conventional wisdom says that while the government can reach the assets of a defendant as part of a disgorgement order, the assets of the defendant's spouse are safe. Not so, said the Second Circuit in *SEC v. Smith*. There, the court issued a summary order, affirming the district court's order directing David Smith to disgorge assets held in his wife's name. The disgorgement order arose in the wake of the SEC enforcement action against David Smith and Timothy McGinn, owners of a firm that the SEC alleged was simply a Ponzi scheme. When ordering disgorgement, the district court included a stock account held in the name of Smith's wife, Lynn. On appeal, Lynn Smith argued that the court should not have included the account in its order against David Smith. The Second Circuit noted that when looking to whether a defendant and "relief defendants" jointly own an asset, the court should focus on the control of the asset to determine its "equitable ownership."

Such ownership is established if an individual "exercise[s] considerable authority over [the assets] . . . acting as though [the] assets [are] his alone to manage and distribute." The Second Circuit found that "the S.E.C. met its burden by submitting evidence that demonstrated the Stock Account received assets from both Lynn Smith and David Smith, evidence that David Smith traded in the Stock Account without Lynn Smith's consent, and evidence that David Smith benefited from the Stock Account by using funds from the Stock Account to pay for expenses such as golf club dues and car payments." As a result, the court held that the account was properly included in the disgorgement order.

Seventh Circuit Reverses Wire-Fraud Conviction

The Seventh Circuit reversed the wire-fraud conviction of David Weimert in *United States v. Weimert*, finding that the prosecution improperly criminalized arm's-length negotiations and stretched the bounds of the wire-fraud statute beyond the breaking point. We previously reported on this case here (with an expanded discussion here), noting that Judge David Hamilton had appeared skeptical about the prosecution during oral argument. Judge Hamilton, joined by Judge William Bauer, has since penned an opinion consistent with that skepticism. To recap: Weimert was the vice president of a bank that was looking to arrange a sale of some of its commercial real estate. Weimert took the opportunity to insert himself into the transaction, collecting both an interest in the property and a finder's fee. In doing so, he "deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if [Weimart] were not included as a minority partner." He was convicted by a jury for wire fraud and appealed the denial of his motion for judgment of acquittal. In the majority opinion, Judge Hamilton noted that "Federal wire fraud is an expansive tool, but as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of the parties to a business deal." He continued, "[I]t is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction." In short, while Weimert misled the potential buyer and the seller, "[a]ll of the actual terms of the deal . . . were fully disclosed and subject to negotiation. There is no evidence that Weimert misled anyone about any material facts or about promises of future actions."

Citizenship Stripped from Fraudster

The Ninth Circuit in *United States v. Olivar* affirmed an order stripping citizenship from a convicted fraudster. Ceferino Orden Olivar Jr. was naturalized as a U.S. citizen in May 2002. Seven years later, in April 2009, he pleaded guilty to visa fraud. The plea included information that the conspiracy began in July 2001, even though he did not commit any overt acts until after May 2002. Nonetheless, the government brought suit to revoke Olivar's citizenship, claiming "he lacked good moral character during the relevant statutory period." A noncitizen seeking citizenship must be "a person of good moral character" in the five years prior to naturalization. 8 U.S.C. § 1427(a). In affirming the order, the Ninth Circuit noted that "Appellant admitted to entering into the conspiracy during the good moral character period and undertook several overt acts in furtherance of the conspiracy. He therefore did not have good moral character when he applied for naturalization, because he had already agreed to commit visa fraud." The court thus found that he "procured his naturalization illegally," which warranted the revocation of his citizenship.

Bringing the Privacy Fight to the Government

While a great deal of attention in recent months has focused on the government's ability to force Apple Inc. to help execute search warrants on handheld devices, Microsoft Corp. recently opened a new front in the privacy battle. As reported here, Microsoft filed a complaint against the DOJ in the U.S. District Court for the Western District of Washington, alleging that a provision of the Electronic Communications Privacy Act (ECPA) is unconstitutional. The provision at issue allows courts to prevent data-hosting companies, such as Microsoft, that receive a warrant for a customer's electronic data from disclosing to the customer the existence of the warrant. Microsoft alleged that it received 5,624 federal demands for customer information in the past 18 months. It also alleged that almost half of them included a "gag order" under the ECPA not to disclose to the target the existence of the warrant. Further, the gag orders often have no end date, meaning the customers might never learn that the government obtained their e-mails, documents or other electronic information stored on Microsoft's servers. Microsoft alleges that the ECPA's provision allowing courts to issue such gag orders when they have "reason to believe" that notification might jeopardize an investigation is unconstitutional.

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