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White Collar Roundup - April 2019

SEC Gets SCOTUS Victory on Rule 10b-5 Scope

The U.S. Securities and Exchange Commission (SEC) got good news from the U.S. Supreme Court in *Lorenzo v. SEC*. The focus of the case was the scope of SEC Rule 10b-5, which broadly prohibits the dissemination of false or fraudulent information about securities offerings. In the case, Francis Lorenzo was the director of investment banking at a registered broker-dealer. Lorenzo was directed to and did send two emails that were written by his boss that sought investments and contained materially misleading statements. The SEC ultimately brought an administrative action against Lorenzo, who was found to have violated the securities laws. He appealed to the U.S. Court of Appeals for the District of Columbia and argued that he was not the "maker" of the statement and therefore couldn't be liable under Rule 10b-5(b), which prohibits persons from making untrue statements of material fact. Lorenzo based his argument on *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), in which the Supreme Court held that a "maker" for the purposes of Rule 10b-5(b) "is the person or entity with the ultimate authority over the statement." Lorenzo argued he wasn't the maker because his boss wrote the statement and directed him to disseminate it. The SEC argued on appeal that even if Lorenzo were correct, he could still be liable under subsections (a) and (c), which don't have the "maker" requirement. The court of appeals agreed, and Lorenzo filed a petition for cert. In a 6–2 opinion, the Supreme Court affirmed. In doing so, it noted, "After examining the relevant language, precedent, and purpose, we conclude that (assuming other here-irrelevant legal requirements are met) dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b–5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not 'make' the statements and consequently falls outside subsection (b) of the Rule." Justice Clarence Thomas dissented. He argued that the majority eviscerated the distinction drawn in *Janus* "by holding that a person who has not 'made' a fraudulent misstatement can nevertheless be primarily liable for it." He warns this opinion "is likely to have far-reaching consequences."

Executive Misconduct Doesn't Always Prompt Charges for Company

Brian A. Benczkowski, assistant attorney general for the Criminal Division of the U.S. Department of Justice (DOJ), spoke at the 33rd Annual ABA National Institute on White Collar Crime earlier this month. He made plain that his priority has been "to foster transparency in [DOJ] corporate enforcement practices." The DOJ has "promoted that transparency through a focus on both the clarity and detail of the policies themselves, as well as their effective dissemination within the Department and to the public." Benczkowski emphasized that the DOJ is "serious about fighting corporate fraud and corruption, and [is] serious about doing so through resolutions that are fair and effective." In that vein, Benczkowski highlighted two matters involving violations of the Foreign Corrupt Practices Act (FCPA), in which high-level executives were prosecuted, but in which the companies were given declination letters. He noted, "These two cases make clear that aggravating factors like high-level executive involvement in the misconduct will not necessarily preclude a declination when the company's actions are otherwise exemplary." He also announced the DOJ's plans to "host the first of what I anticipate will be an annual training program for white-collar prosecutors, with a focus on how we, as prosecutors, will evaluate the effectiveness of corporate compliance programs." Stay tuned!

CFTC Getting Into the Anti-Corruption Game

James McDonald, the enforcement director of the Commodities Futures Trading Commission (CFTC), announced a new initiative at the same ABA White Collar Conference. Noting that "twenty-first century bad actors do not conform their misconduct to the technical boundaries of our respective jurisdictions, nor do they pause as their conduct crosses international borders," McDonald committed his agency to "work together" with other law enforcement partners. Specifically,

he focused on "one type of misconduct that can undermine our domestic markets: violations of the [Commodity Exchange Act] carried out through foreign corrupt practices." To combat this type of misconduct, McDonald announced the CFTC would work with the DOJ and the SEC, a form of coordination that "began through conversations with our enforcement partners about factual scenarios known to them, to which we at the CFTC might be able to add our expertise about how those facts would affect American derivatives markets." He also made clear that the CFTC does not intend to "pile onto other existing investigations" and "will work closely with [other enforcement authorities] to avoid duplicative investigative steps." But, he said, "We at the CFTC will do our job as part of the team to identify corruption in our markets and hold wrongdoers accountable, working closely and in coordination with our law enforcement partners domestically and abroad." In doing so, he announced that the Division of Enforcement was releasing an Enforcement Advisory on cooperation and self-reporting. It's available here.

New Jersey Takes Position in New Hampshire Litigation on Online Gaming

Gurbir S. Grewal, New Jersey's attorney general, recently took the unusual step of filing an amicus brief in a lawsuit pending in New Hampshire Federal Court. In that case, *New Hampshire Lottery Commission v. Barr*, New Hampshire's Lottery Commission is seeking to stop the recent DOJ interpretation of the Wire Act from taking effect. As we reported here, the DOJ recently reversed its interpretation of the Wire Act and decided that it does apply to all interstate gaming, not simply to interstate sports gaming. In announcing the filing, Grewal didn't mince words: "The future of New Jersey'[s] online gaming industry is at stake because of DOJ's unlawful about-face regarding internet gaming—activity that DOJ promised us was perfectly legal just eight years ago. We will not stand by and let this arbitrary, politically-driven reinterpretation destroy a vibrant and essential industry here in our state. Online gaming is vital ... to the economic well-being of Atlantic City and New Jersey, and we are proud to stand with New Hampshire in challenging the opinion." The thrust of the brief's argument is that the DOJ shirked its duty under the Administrative Procedures Act (APA) "to take into account the heavy reliance states now have on an industry that exists solely because DOJ assured them in 2011 that it was legal." As stated in the press release, "the brief points out that the U.S. Supreme Court has repeatedly held that an agency's reinterpretation of a statute 'must be rejected' under the APA if it reverses a prior interpretation by the same agency 'without adequately accounting for reasonable reliance interests that have accrued in the interim.'" Grewal's statement is reported here.

Cybersecurity Disclosure Bill Is Back

Representative Jim Himes, D-Connecticut, introduced the Cybersecurity Disclosure Act of 2019, which "would make the SEC issue a new set of rules requiring U.S. companies to tell their investors whether they have someone who has cyber experience on their board." And, more than that, the rules would force companies that don't to "explain to their investors why this is the case." "Publicly traded companies should have an obligation to let their shareholders know how they are addressing these serious threats or explain why they are not taking measures to counter attacks," Himes said in a press release. "Billions of dollars of American wealth are at risk, and I am tired of seeing American companies play catch-up against our geopolitical rivals or lone-wolf threats." A similar measure has been introduced in the Senate by Senators Susan Collins, R-Maine; Mark Warner, D-Virginia; John Kennedy, R-Louisiana; and Jack Reed, D-Rhode Island. Himes claimed his bill "will give the public information about which companies are likely to have better protections and cyberdefense strategies" and that "Americans' private and identifying information is in the hands of corporations who may not be prepared to protect it." To read more, click here.

White-Collar Prosecution Slowdown

According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the number of white collar prosecutions in January 2019 was at a "historic low." TRAC portrays itself as "Your source for comprehensive, independent and nonpartisan information about federal enforcement, staffing and spending." The TRAC bulletin on white collar prosecutions reports, "The latest available data from the Justice Department show that during January 2019 the government reported 337 new white collar crime prosecutions. This is an historic low since monthly tracking began in October 1998." TRAC notes that "this number is down 20.3 percent over the previous month, and continues a five-month downward slide." The report continues, "Compared to five years ago, January filings were down 35.7 percent. White-collar prosecutions since President Trump assumed office generally have been lower than in previous administrations." The report backing up the bulletin is available here. In a separate bulletin, TRAC reported that "IRS referrals of taxpayers for criminal prosecution relative to population size have plummeted by 75 percent in the last twenty-five years, dropping by 63 percent in just the last

five years. The number of taxpayers convicted as a result of IRS investigations reached an all-time low in FY 2018. There were only 530 convictions for tax fraud." The full report about the IRS's activities is available here. Notably, in his speech highlighted above, AAG Benczkowski, citing data to support his position, said that DOJ's "commitment to white-collar criminal enforcement and the promotion of ethical business practices remain[s] as strong as ever."

Second Circuit Finds Speedy Trial Violation Despite Superseding Indictment

In *United States v. Black*, the Second Circuit concluded that the defendants' Sixth Amendment rights to a speedy trial were violated. As we reported here, the Second Circuit made a similar decision in January 2018 in *United States v. Tigano*. In *Black*, the prosecution brought the defendants to trial more than 60 months after their arrest. The Second Circuit reviewed the four-factor standard under *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"), and held that the Sixth Amendment had been violated. Notably, Judge Denise Cote of the U.S. District Court for the Southern District of New York, sitting by designation, dissented with respect to the dismissal of the counts that initially appeared in the superseding indictment. She argued that the fact that the government filed a superseding indictment midway through the delay should have restarted the speedy trial clock as to those counts. In her view, the subsequent charges would begin a new clock if they had distinct elements, rendering them different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932). The so-called *Blockburger* test calls upon a court to determine whether subsequently filed charges would violate the Double Jeopardy Clause because they have identical elements. The majority in *Black* rejected Judge Cote's analysis. In doing so, it held that the Speedy Trial right attaches at the time of arrest, when the defendant's liberty interests are implicated, not when he or she is indicted. The majority rejected the alternate approach as follows: "[T]he practical application of this principle would require us to turn a blind eye to years of pre?trial incarceration that ultimately became oppressive." It therefore held "that the relevant interval for [a defendant's] Sixth Amendment speedy trial claim is from the *first* indictment or arrest to trial."

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