March 3, 2015

# White Collar Roundup - March 2015

**Mad Libs, Dr. Seuss and Limiting the Reach of Sarbanes-Oxley**

The U.S. Supreme Court in *Yates v. United States* limited the reach of 18 U.S.C. ?1519?-- part of the Sarbanes-Oxley Act of 2002?-- by interpreting the term "tangible objects" in that statute to include only such objects that relate to records or record keeping. In Yates, a commercial fisherman's ship had been boarded by federal authorities who were checking to ensure that no red groupers that were too small had been caught and kept. Unfortunately for the fishermen, the authorities found some too-small fish, asked that they be segregated in a box, and told the captain to meet up back at port. Once there, the fish were gone. A crew member told the authorities that the captain, John Yates, told him to pitch the contraband fish over the side. The government charged Yates with violating ?1519, which calls for up to 20 years in prison for one who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" an investigation. Yates argued that "tangible object" in the statute includes only record-type items, and not fish. The prosecutors (and the district court) disagreed, and Yates was convicted. On appeal, the U.S. Court of Appeals for the Eleventh Circuit supported the district judge's interpretation and affirmed. The Supreme Court reversed, holding through a four-member plurality (Justice Samuel Alito concurred in the judgment) that the term "tangible object" in ?1519 included only objects that relate to documents or records, such as electronic storage media. In her dissent, Justice Elena Kagan took the plurality and concurrence to task for ignoring that "[a] fish is, of course, a discrete thing that possesses physical form," which is the ordinary conception of a "tangible object," citing Dr. Seuss's *One Fish Two Fish Red Fish Blue Fish*. She also claimed Justice Alito endeavored to "hinge" ?1519's meaning "on the odd game of Mad Libs." Finally, she criticized the statute, noting, "?1519 is a bad law?-- too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." She continued, "In those ways, ?1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."

**Eliminating a Hurdle to Electronic Seizure**

Google Inc. has a lot of electronic media in its possession. Every Gmail account, Google Doc, and Google Calendar is under Google's control. Today, Federal Rule of Criminal Procedure 41 prohibits a federal judge in one district from issuing a search warrant to search for evidence in another district. The Advisory Committee has proposed changing that rule to allow the government to obtain a warrant for "remote access" to search electronic storage media when its physical location is "concealed through technological means." Google has filed an objection to this change, arguing it would vastly increase the government's power and undermine the privacy rights of Internet users. The Department of Justice (DOJ) has responded to Google's letter and supports the changes. For the proposed changes, click here (at page 338 of the PDF). For more on Google's filing, click here. A PDF of Google's filing can be downloaded here. A PDF of the DOJ's response can be downloaded here.

**SEC's Efforts to Cope with *Newman***

In an administrative proceeding brought by the Securities and Exchange Commission (SEC), the parties have been dealing with the impact of the Second Circuit's recent ruling in *United States v. Newman*. There, the court established that to convict a defendant of insider trading the government had to prove that an insider with a fiduciary duty breached it by disclosing

confidential information in exchange for a personal benefit. It then must prove that the tippee knew that the information received was both confidential and disclosed for a benefit. In the administrative proceeding, which is unrelated to *Newman*, the SEC recently filed a supplemental submission in opposition to the respondent's motions for summary disposition that relied, in part, on *Newman*'s rule. The SEC's filing attempts to establish that the *Newman* factors were present. The respondent disputes the SEC's contentions. The SEC filing is here. The respondent's filing is here.

**Limits to the Grease-Payments Carve Out in the FCPA**

The Eleventh Circuit in *United States v. Duperval* addressed the meaning of "routine government action" in the context of a prosecution for violating the Foreign Corrupt Practices Act (FCPA). The FCPA allows "grease payments" to be made in foreign countries if they are paid for "routine government action." Here, Jean Rene Duperval was an official at a telecommunications company owned by the government of Haiti, known as Teleco. In that role, Duperval managed contracts with foreign telecommunications companies. Individuals at two companies paid Duperval to ensure their firms won contracts with Teleco. At trial, Duperval asked the district court to charge the jury regarding the grease-payments exception to the FCPA. The court refused to give the charge, Duperval was convicted, and he raised that issue on appeal. The Eleventh Circuit affirmed. The court noted the statute defines this exception very narrowly and courts are loath to expand its reach. The court explained the grease-payments exception applies only to payments to a "low-level employee" who provides a "routine service." And because Duperval was a "high ranking official who administered international contracts," his conduct was hardly a "routine service." Finally, the statute describes that paying a decision-maker to continue a contract with the government is not "routine government action." The court found the payments to Duperval for "doing a good job in administering the current contract" to fall within that description.

**State Property Laws Can't Save Conduit Campaign Contributors**

The Ninth Circuit in *United States v. Whittemore* explored the interrelationship between state laws regarding gifts and federal laws regarding conduit campaign contributions. In the case, defendant F. Harvey Whittemore agreed to raise $150,000 for Nevada Senator Harry Reid's (D-NV) reelection campaign. In doing so, he gave $145,000 in $5,000 increments to his relatives and to employees of a company he chaired. Those individuals in turn contributed $4,600 to Senator Reid's campaign, which is the maximum allowed under federal law. Whittemore was prosecuted for making excess campaign contributions and for making conduit contributions (i.e., contributions through others). At trial he claimed that, under Nevada property law, once an individual makes an "unconditional gift" to another, that gift becomes the property of the individual. And if that person "voluntarily" chooses to contribute to a campaign, it is not a conduit contribution under federal law. The district court refused to give a jury charge to that effect, and Whittemore was convicted. The Ninth Circuit agreed, holding that the definition of "contribution" in the statute, which includes "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate," precluded Whittemore's contention. It further reasoned Nevada's property law does not supplant this definition.

**#SeekingInformationFromTwitter**

Social-media giant Twitter, Inc. released its biannual reports about government requests, among others, for account information. The company noted it received approximately 40% "more requests for account information affecting 128% more account holders during the second half of 2014" than in the first half of the year. The firm considers the rise to "follow industry trends" and to be, in part, due to its "continued international expansion." The United States made 56% of all requests. To access the reports, click here.

**Acceptance of Responsibility Means Acceptance of All Responsibility**

The Fourth Circuit in *United States v. Burns*, a firearms-possession case, affirmed the district court's refusal to give an acceptance-of-responsibility reduction to a defendant who denied uncharged, relevant conduct at sentencing. In the case,

defendant Otis Burns pleaded guilty to being a felon in possession of a firearm. The district court found Burns had used the gun in an attempted murder and sought to apply the requisite enhancement under the sentencing guidelines. At sentencing, Burns denied he had the mens rea for attempted murder and claimed he only had the mens rea for aggravated assault. Therefore, he argued, the guidelines enhancement would not apply. The district court disagreed, found he had the mens rea for attempted murder, and refused to apply the three-level reduction for acceptance of responsibility. Burns appealed, claiming he accepted responsibility for the charged conduct, which warranted the reduction. The Fourth Circuit disagreed. It noted the comments to the guidelines say that the reduction is appropriate to those who "truthfully admit[] or not falsely deny[] any additional relevant conduct for which the defendant is accountable." The court reasoned the mental-state requirement for attempted murder was a component of the relevant conduct and affirmed the district court's refusal to apply the reduction.