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White Collar Roundup - March 2018

DOJ Announces Cybersecurity Task Force

Attorney General Jeff Sessions ordered the creation of a Cyber-Digital Task Force to "canvass the many ways the Department is combatting the global cyber threat" and to "identify how federal law enforcement can more effectively accomplish its mission in this vital and evolving area." Deputy Attorney General Rod Rosenstein will appoint a chair for the task force, which will also "consist of representatives from the Department's Criminal Division, the National Security Division, the United States Attorney's Office community, the Office of Legal Policy, the Office of Privacy and Civil Liberties, the Office of the Chief Information Officer, the ATF, FBI, DEA, and the U.S. Marshals Service." The task force is slated to issue a report to the attorney general by the end of June. The attorney general asked it "to prioritize its study of efforts to interfere with our elections; efforts to interfere with our critical infrastructure; the use of the Internet to spread violent ideologies and to recruit followers; the mass theft of corporate, governmental, and private information; the use of technology to avoid or frustrate law enforcement; and the mass exploitation of computers and other digital devices to attack American citizens and businesses." For the press release, click here.

Guilty Plea Doesn't Waive Right to Contest Constitutionality of Statute

As we reported here, in *Class v. United States*, the U.S. Supreme Court took up the issue of whether a defendant waives any constitutional challenges by entering a guilty plea. The Court held that such challenges are preserved unless expressly waived in the plea agreement. The case involves Rodney Class, who is a retired veteran residing in North Carolina. Class traveled to Washington, D.C., in May 2013 and "left his lawfully-owned firearms secured out-of-sight in bags inside his locked vehicle," which he parked in a public lot about 1,000 feet from the U.S. Capitol Building. Class didn't know that the lot was part of the "Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. §5104(e)." When Class was away from his vehicle, a police officer saw in the cab of the vehicle what she mistakenly believed was a gun holster. When Class returned, he was arrested and his vehicle was searched. The firearms were discovered, and Class was charged with violating §5104(e). Class raised several challenges to §5104(e), including under the Second Amendment and Due Process Clause. The district court denied those claims, and Class pleaded guilty. Class then appealed to the D.C. Circuit, claiming §5104(e) violated the Second Amendment and due process by failing to identify what constitutes "Capitol Grounds." The court affirmed his conviction, holding that by pleading guilty, Class inherently had waived his constitutional claims. To resolve a circuit split on this issue, the Supreme Court granted his writ of certiorari and agreed with him, reversing the court of appeals. It held that his claims "challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to 'constitutionally prosecute' him. A guilty plea does not bar a direct appeal in these circumstances."

Third Circuit Vacates Lengthy Sentence for Insider Trading Conspiracy

The U.S. Court of Appeals for the Third Circuit in *United States v. Metro* vacated the 46-month sentence of imprisonment of defendant Steven Metro, who pleaded guilty to one count of conspiracy to violate federal securities laws and one count of insider trading. On appeal, Metro argued that the district court "wrongly attributed to him illicit financial gains actually attributable to someone with whom he was not acting in concert and to whom he did not provide inside information." The Third Circuit found the sentencing court's factual findings to be insufficient to support the sentence and vacated it. Metro was a managing clerk at a large law firm in New York City and "engaged in a five-year insider trading scheme in which he abused his position at the firm by disclosing material nonpublic information to his close friend Frank Tamayo." Tamayo learned information from Metro and passed it along to his stockbroker, Vladimir Eydelman, who would execute trades based on the information not only for Tamayo, but also for himself, his family, his friends and other brokerage clients. Metro claimed he

knew Tamayo would trade on the information, but had no idea that Eydelman existed, let alone that he would trade on behalf of others. Metro ultimately pleaded guilty, and the presentence report attributed $5.6 million in illicit trades to him in its calculation under the U.S. Sentencing Guidelines. Metro objected to the calculation, claiming he had no knowledge about Eydelman or his conduct. The district court disagreed and sentenced Metro based on the total loss amount. On appeal, the Third Circuit noted that U.S.S.G. § 1B1.3(a)(1)(B), which addresses relevant conduct for sentencing purposes, requires a three-step analysis: "(1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity." Finding that the district court had not engaged in this inquiry, the Third Circuit vacated the sentence and remanded for it to do so.

CFTC Cyber Enforcement

As reported here, the U.S. Commodity Futures Trading Commission (CFTC) settled with AMP Global Clearing LLC "for its failure between June 21, 2016 and April 17, 2017 to supervise diligently the implementation of critical provisions in AMP's information systems security program." The result of this purported failure is that "a significant amount of AMP's customers' records and information were left unprotected for nearly ten months." This appears to be the first fine imposed by the CFTC for a failure to implement adequate cybersecurity protocols to secure customer data. Will it be the last? Only time will tell, but probably not.

Cooperator Caught Red-Handed

High drama ensued at the corruption trial of Joseph Percoco, a former top aide to New York Governor Andrew Cuomo. During the cross-examination of cooperating witness Todd R. Howe, a defense lawyer asked about a 2016 trip to New York that Howe took to meet with prosecutors, during which he stayed at the tony Waldorf-Astoria hotel. Under cross-examination, Howe admitted that several weeks after he had signed his cooperation agreement, he called his credit card company to dispute the $600 hotel charge from the Waldorf, claiming he hadn't stayed there. As detailed here, defense attorney Daniel Gitner asked, "You lied to your credit card company about staying at the Waldorf the very night that you had come to New York to see the government?" Howe replied, "Correct." Gitner noted that was a breach of Howe's cooperation agreement, which by the end of that very day resulted in the revocation of Howe's bail. The trial is ongoing.

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