February 3, 2014

White Collar Roundup - February 2014

So Much Money

Attorney General Eric Holder announced that the U.S. Department of Justice (DOJ) collected more than $8 billion as the result of civil and criminal actions in the fiscal year that ended on September 30, 2013. Approximately $3.2 billion was related to healthcare fraud, and more than $430 million came as the result of environmental cases. The total haul dwarfs the DOJ's direct appropriations of $2.76 billion that fund its litigation divisions, including the 94 U.S. Attorneys' offices. To read the press release, click here.

Kickbacks for Others Still Amount to Honest-Services Fraud

The U.S. Court of Appeals for the Second Circuit in *United States v. DeMizio* analyzed the impact of *United States v. Skilling*on the defendant's pre-*Skilling* conviction for honest-services fraud. In the case, the defendant, Darin DeMizio, was convicted of wire fraud for steering "finder's fees" in stock-loan transactions to his father and brother, who did very little work to earn the fees. After conviction, the *Skilling* decision came down, and DeMizio then argued he should have a new trial in light of that case. The Second Circuit held that while the jury instructions at his trial were erroneous, the error was harmless. It also rejected DeMizio's argument that "kickbacks (a) do not include payments made to entities other than the employee who steers his employer's business to a third party in exchange for those payments, and (b) do not include payments of large sums of money to those recipients so long as they perform some minimal work." Instead, the court concluded that "[a]lthough the kickback amount frequently is paid directly to the employee who steered the contract, the scheme is no less a kickback scheme when the employee directs the third party to share its profits with an entity designated by the employee in which the employee has an interest." Further, the scheme "qualifies as a kickback scheme where the recipient receives inordinate amounts of money for doing minimal work."

Laying Out the Rules on Searching Cellphones

The U.S. Supreme Court agreed to hear two cases regarding whether police can search an arrested suspect's cellphone without a warrant. The Court agreed to hear both a state case, *Riley v. California*, and a federal one, *United States v. Wurie*. The question presented in *Wurie* is "[w]hether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cellphone found on a person who has been lawfully arrested." The Court granted the petition in *Riley* but limited the question to "[w]hether evidence admitted at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights." Interestingly, in *Wurie* the defendant had a simple flip phone, while in *Riley* he had a smartphone. Does that matter? We'll find out later in the term. For more, click here.

There's a Limit to the Scope of Restitution

The Fourth Circuit in *United States v. Freeman* limited the basis for restitution to funds lost because of the offense of conviction. In the case, Robert Freeman, also known as "Dr. Shine," who purported to be a minister, had convinced churchgoers to donate money to the church. Instead of using that money for the church, he converted it to his own use, buying cars, homes and other goods. Ultimately, he filed for bankruptcy and made a number of false statements in his bankruptcy petition. After these lies were discovered, he was indicted and pleaded guilty to obstructing an official proceeding,

in violation of 18 U.S.C. 1512(c)(2). At sentencing, the court ordered him to pay more than $630,000 in restitution to four of his purported victims. Freeman appealed the order. The Fourth Circuit held that "because the specific conduct that is the basis for [Freeman's] conviction did not cause the purported victims' losses, they are not entitled to restitution." The court vacated the sentence and remanded. The Fifth Circuit had a similar ruling in *United States v. Campbell*.

A New Kind of Seizure: Bitcoins

The government has seized approximately $28 million in Bitcoins from the alleged Silk Road mastermind, Ross William Ulbricht. Ulbricht has been charged with hacking and drug trafficking, and the government filed a civil forfeiture complaint against his Bitcoins, seizing approximately 29,655 of them. Bitcoins are currently trading at about $937 each. To read the press release from Preet Bharara, the U.S. Attorney for the Southern District of New York, click here. For more about the complaint and Ulbricht's initial response, click here.

Speaking of Bitcoins . . .

Mr. Bharara also announced the arrest of Bitcoin exchangers, including the CEO of a Bitcoin exchange company, for money laundering in connection with the Silk Road investigation. Mr. Bharara said, "As alleged, Robert Faiella and Charlie Shrem schemed to sell over $1 million in Bitcoins to criminals bent on trafficking narcotics on the dark web drug site Silk Road. Truly innovative business models don't need to resort to old-fashioned law-breaking, and when Bitcoins, like any traditional currency, are laundered and used to fuel criminal activity, law enforcement has no choice but to act. We will aggressively pursue those who would co-opt new forms of currency for illicit purposes."

Dodge an SEC Subpoena, Face Jail

According to this press release, Anthony Coronati was arrested on civil contempt charges filed by the U.S. Securities and Exchange Commission (SEC) for ignoring its subpoena for documents and testimony. The SEC had served a subpoena on Coronati in 2013, but he "neither produced documents nor appeared for testimony." As a result, the SEC filed for an order to comply with the subpoena, which the court ordered on November 7, 2013. On January 17, 2014, the court found Coronati in contempt for ignoring its November order. Coronati was arrested by the U.S. Marshals Service. At a hearing before Judge William H. Pauley III in the Southern District of New York, Coronati was released on bail and ordered to appear for a hearing on February 6.

Paying (With Prison) for the Costs of Internal Investigation

Judge Edward M. Chen of the District Court for the Northern District of California held in *United States v. Nosal* that the "actual loss" for a violation of the Computer Fraud and Abuse Act includes the costs incurred by the employer to conduct an internal investigation to unearth the fraud. In the case, David Nosal was convicted for unlawfully downloading information from his prior employer's servers. After analyzing the statute and case law, Judge Chen held that "'actual loss' includes those costs incurred as part of an internal investigation reasonably necessary to respond to the offense, for example, by identifying the perpetrator or the method by which the offender accessed the protected information."