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White Collar Roundup - December 2018

Softening the Yates Memo

On November 29, Deputy Attorney General Rod Rosenstein announced a revision of the DOJ's policy that organizations must provide information on individual wrongdoers to receive cooperation credit. As we reported here, in September 2015, then-Deputy Attorney General Sally Quillian Yates issued a memorandum to all federal prosecutors, called "Individual Accountability for Corporate Wrongdoing." The "Yates Memo" required prosecutors to learn which individuals at an organization were involved in the wrongdoing if the organization wanted to receive cooperation credit. That policy was incorporated into the *Justice Manual*. Rosenstein announced the DOJ has revised the policy to "make ... clear that any company seeking cooperation credit in criminal cases must [still] identify every individual who was substantially involved in or responsible for the criminal conduct." But it is no longer necessary for "companies to identify every employee involved regardless of relative culpability." And "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." In his remarks, Rosenstein made the DOJ's goals plain: "We want to focus on the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it." Therefore, the revised policy requires that "[i]f a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct." The *Justice Manual* has been updated to reflect these changes. For that, click here.

No Goal: FIFA Asks for a Lot, but Gets a Little

The FIFA bribery case took another disappointing turn for the embattled soccer organization. U.S. District Judge Pamela Chen issued an order determining the extent of restitution owed to FIFA by the defendants convicted as part of the case. Among the amounts of restitution sought were legal fees incurred by FIFA after the unsealing of the indictments against several high-ranking FIFA officials. FIFA sought repayment of $27,808,463.93 in legal fees and expenses, consisting of "(1) $16,393,911.51 in attorneys' fees for reviewing documents in connection with the government's investigation of Defendants; (2) $1,725,670.00 in attorneys' fees for preparing investigative reports for American and Swiss authorities; (3) $105,601.88 in attorneys' fees for a Quinn Emanuel ... attorney to attend the entirety of Defendants' trial; (4) $9,474,154.56 in fees for Stroz Friedberg, a forensic data consulting company that processed and hosted the millions of documents collected during FIFA's investigation; (5) $28,237.00 in attorneys' fees for preparing Stephanie Maennl to testify at Defendants' trial, as well as fees for her attorneys' presence during her testimony; and (6) $80,888.98 in attorneys' fees to prepare FIFA's restitution request." Judge Chen relied on the opinion in *Lagos v. United States*, in which the Supreme Court held that the Mandatory Victims Restitution Act provides for "restitution only for investigation expenses incurred during a victim's participation in 'government investigations and criminal proceedings' and 'does not cover those costs of a private investigation that the victim chooses on its own to conduct.'" As a result, Judge Chen denied the first four categories, holding that FIFA undertook to expend those fees on its own and not at the request of the government. She allowed the latter two categories. But even there, she found the requested fees "excessive with respect to the preparation of Maennl's testimony and FIFA's restitution request." She therefore held that out of the $27,808,463.93 requested, FIFA was entitled to "$64,445.94 in restitution for attorneys' fees and investigative costs." In case you're wondering, that's just above 0.23 percent.

Blocking and Tackling: IRS Focusing on 'Traditional Tax Crimes'

Taxes usually don't get people too excited, but the IRS added a little spice to the subject by highlighting the accomplishments of its criminal division in its Criminal Investigation Annual Report 2018. As noted in this press release, the IRS's Criminal

Investigations Division (CI) "initiated 2,886 cases in fiscal 2018, with traditional tax cases accounting for 73 percent of the total. The number of CI special agents dipped below 2,100 by the end of fiscal 2018, which is the lowest level since the early [1970s]. Consequently, CI turned to data analytics to assist in finding the most-impactful cases." In the release, CI boasted about its "conviction rate of 91.7 percent," which it noted is "among the highest of all federal law enforcement agencies." It attributed the high conviction rate to "the thoroughness of CI investigations and the high quality of CI agents." The report also noted that "[s]ince 2015, CI has been building a Cyber Crimes Program to address the exponential growth of cybercrime impacting the tax, financial, and economic systems of the United States." Notably, fiscal year 2019 "marks the 100-year anniversary of CI as a law enforcement agency." It appears the agency will celebrate its centennial by continued focus on traditional tax cases.

GDPR Guidance From Across the Pond

For organizations struggling to comply with the General Data Protection Regulation (GDPR) (and as we reported here, that's a lot of organizations), there's a new resource from the United Kingdom. Its Information Commissioner's Office (ICO) recently issued a guide to the GDPR. For those who are wondering, the ICO is "the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals." The guide "explains the provisions of the GDPR to help organisations comply with its requirements. It is for those who have day-to-day responsibility for data protection." For the guide, click here. The ICO also provides a link to a GDPR self-assessment tool, which is available here.

CFTC's 2018 Enforcement the Highest Ever

There's more to successful enforcement than just making a lot of cases. Commodity Futures Trading Commission (CFTC) Enforcement Director James M. McDonald made that point in a speech at the NYU School of Law Program on Corporate Compliance and Enforcement. He began by noting the CFTC measures its success by "more than just numbers." He said a strong enforcement program is "about preserving market integrity, protecting customers, and deterring potential bad actors from engaging in misconduct in the first place. It's about being tough, to be sure, but it's also about being fair. And it's about allocating resources efficiently to ensure [its] efforts target the most pernicious forms of misconduct." McDonald then noted the numbers show that 2018 "was a year of incredibly vigorous enforcement at the CFTC." He explained, "That's true whether you measure it by the number of filed cases (third highest in CFTC history), amount of penalties imposed (fourth highest), number of large-scale matters (highest), types of cases charged (most ever involving manipulative conduct), number of parallel criminal actions (highest), percentage of cases that include individual charges (more than 2/3), or the number and amount of whistleblower awards (highest on both counts)." Looking ahead, he then spoke about the CFTC's four enforcement priorities for 2019: "(1) preserving market integrity; (2) protecting customers; (3) promoting individual accountability; and (4) enhancing coordination with other regulators and criminal authorities." For the CFTC's annual report, click here.

The Digital Witness

It might not be long before the next witness called to the stand at trial is either "Alexa," "Siri" or "Google." As explained here, a judge in New Hampshire ordered Amazon "to share recordings from an Echo device at the scene of an alleged double murder." According to the article, prosecutors want two days of recordings from the Amazon Echo device from the home where two women were found dead in January 2017. "The judge directed the company to turn over evidence in the case, but so far, Amazon has said it 'will not release customer data without a valid and binding legal demand properly served on us.'" While prosecutors think that the device might have evidence about who murdered the women, Amazon has expressed competing concerns. According to a spokeswoman, "'Amazon objects to overbroad or otherwise inappropriate demands as a matter of course.'" As the Internet of Things grows, so will the number of demands from law enforcement for information and data to investigate crimes.

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