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White Collar Roundup - November 2018

New DOJ Memorandum on Monitorships

Assistant Attorney General Brian A. Benczkowski made a splash at the NYU School of Law Program on Corporate Compliance and Enforcement Conference by unveiling the new policy by the U.S. Department of Justice (DOJ) for selecting corporate monitors. In his remarks, he announced that the previous day he "issued new guidance relating to the imposition and selection of corporate monitors in Criminal Division matters." The "approach to the new policy began with the foundational principle that the imposition of a corporate monitor is never meant to be punitive. It should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct. That approach is consistent with our longstanding practice of imposing corporate monitors as the exception, not the rule." Monitorships, he continued, have long been the exception, and the "new policy explicitly recognizes that, 'the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.'" The policy sets forth various factors, "including the type of misconduct—such as whether it involved the manipulation of books and records or the exploitation of inadequate internal controls and compliance programs" for prosecutors to consider when deciding whether to insist on a monitorship. Other factors relate to "investments and improvements" the company made to its corporate compliance program and internal controls, whether new leadership is in place, and the "financial costs to a company, as well as unnecessary burdens to the business's operations." Benczkowski also noted changes to the monitor selection process. He said, "[O]ur goal here is to ensure that the process is fair, ensures the selection of the best candidate, and avoids even the perception of any conflicts of interest." Benczkowski concluded, "Ultimately, a monitor should benefit the company, its employees, shareholders, and the public by effectively furthering the goal of preventing and detecting future misconduct."

GDPR Compliance Still Lagging

As reported here, "[n]early one in five companies may never comply with the European Union's General Data Protection Regulation," known as GDPR. That statistic is according to a report issued by the International Association of Privacy Professionals (IAPP) and the firm Ernst & Young (EY). According to the IAPP-EY Annual Privacy Governance Report 2018, firms that by-and-large acknowledge they are subject to the GDPR are woefully behind in meeting its compliance requirements. The report breaks down the data regarding compliance demographically to detail where the gaps lie. Notably, even of those that have complied, only 32 percent of organizations consider their program "mature." And this is despite the fact that the "mean company spent $3M on GDPR compliance." The clear takeaway from the report is there is much work to be done.

DOJ Uncovers Massive Healthcare Fraud Scheme

The DOJ announced the unsealing of a 32-count indictment charging four people and seven companies in a $1 billion healthcare fraud scheme. "According to the indictment, the defendants set up an elaborate telemedicine scheme in which [a telemedicine company] fraudulently solicited insurance coverage information and prescriptions from consumers across the country for prescription pain creams and other similar products." The patients would speak with doctors over the phone and the doctors would write prescriptions for various compound medicines—medicines pharmacists had to compile—and pain creams. "The indictment states that doctors approved the prescriptions without knowing that the defendants were massively marking up the prices of the invalidly prescribed drugs, which the defendants then billed to private insurance carriers." Some of the prescriptions were purportedly marked up more than 1,000 percent. The DOJ also announced that the telemedicine company HealthRight LLC and its CEO, Scott Roix, already pleaded guilty to healthcare and wire fraud. The wire fraud

scheme involved the use of "HealthRight's telemarketing facilities to fraudulently sell millions of dollars' worth of products such as weight loss pills, skin creams, and testosterone supplements through concocted claims of efficacy and intentionally deficient customer service designed to stall consumer complaints."

Stuck at Security, but Convicted Anyway

The U.S. Court of Appeals for the Eleventh Circuit dealt a blow in *United States v. Garcia*—which it described as a "troubling case"—by affirming the conviction of Lourdes Margarita Garcia, who, along with her attorney, missed 10 minutes of her own trial due to delays at courthouse security. Garcia had been charged with several counts of tax evasion and decided to proceed to trial. The trial lasted "more than 49 hours" in total. One day, in the midst of the direct examination of a government witness, the court broke for lunch. After lunch, Garcia and her lawyer were held up in the courthouse's security line and didn't return to the courtroom before the trial resumed. Yes, the trial resumed without the defendant or her attorney present. As the government conceded on appeal and as the Eleventh Circuit recognized, the trial court's decision to allow evidence to proceed in this manner "violated the defendant's right to counsel, her right to confront the witnesses arrayed against her, and her right to be present at trial under both the Due Process Clause and Fed. R. Crim. P. 43." Notably, the day after this incident occurred, the government asked for "a sidebar to discuss the error." While doing so, the government detailed what had happened and suggested the court have the missed testimony read back so the defendant and her lawyer could hear it. The defense counsel didn't join in that offer. Even more remarkably, during the sidebar, "the prosecutor bluntly asked defense counsel: 'You are not going to state an objection at this point?' Defense counsel replied: 'Not at this time, no.'" Because there was no objection to this error during trial, the Eleventh Circuit reviewed it for plain error. Under that standard, if the defendant proves "(1) error, (2) that is plain, and (3) that affects substantial rights," then the appellate court may "notice the forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Here, the Eleventh Circuit concluded the error didn't affect Garcia's substantial rights because the evidence against her was overwhelming and the missed evidence was both "largely irrelevant" and directly contradicted by her own testimony. As a result, it affirmed her conviction. Circuit Judge Charles R. Wilson wrote a separate concurrence in which he argued the Eleventh Circuit should revisit its precedent to deem this type of error structural and entitled to automatic reversal. Following precedent, however, he determined the conviction should be affirmed under both plain error and harmless error, which he considered the more appropriate standard of review.

Adding Time to Corporate Monitorship

U.S. District Judge Ed Kinkeade of the U.S. District Court for the Northern District of Texas extended the corporate monitorship for defendant ZTE Corporation as a condition of probation. The Chinese technology giant had pleaded guilty to violating the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq., by selling sanctioned technology to Iran. ZTE was sentenced to probation, which included having a corporate monitor supervise its compliance with its legal obligations until June 2020. In July 2017, ZTE submitted a letter to the Department of Commerce and to the corporate monitor regarding certain bonuses it had paid to disciplined employees. That letter claimed those employees hadn't received bonuses, when in fact they had. The Department of Commerce learned of the falsehoods and sanctioned ZTE. Because that letter had also been sent to the corporate monitor, he moved the court to modify the conditions of probation and extend the term of the monitorship. The court agreed, issuing this order, which extended the monitorship to March 22, 2022.

Wading into the Weeds of Article I of the Constitution

Former U.S. Congressman Aaron Schock won a six-month reprieve from facing trial on corruption charges. As described in this article, Schock "is accused of using money from his campaign accounts and his House allowance for personal expenses ranging from an extravagant remodeling of his office inspired by the British television show 'Downton Abbey' to flying on a private plane for a Chicago Bears game." The trial was originally set for January 2019, but U.S. District Judge Matthew Kennelly of the U.S. District Court for the Northern District of Illinois rescheduled the trial for June 2019. The reason? To allow the U.S. Supreme Court time to rule on Schock's certiorari petition. In it, Schock asks the high court to dismiss the entire indictment for violating both the "Rulemaking Clause" (Article I, § 5, cl. 2), which gives the House of Representatives jurisdiction to "determine the Rules of its Proceedings," and the "Speech or Debate Clause" (Article I, § 6, cl. 1), which provides that "for any Speech or Debate in either House, [Senators and Members of the House of Representatives] shall not be questioned in any other Place." According to the petition, "The Seventh Circuit held that it lacked jurisdiction to consider the Rulemaking Clause claim in an acknowledged circuit split, and rejected [the] Speech or Debate Clause on the merits."

The Supreme Court is due to rule on the petition early next year, which, if denied, will give Schock and the government time to prepare for trial.

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