November 3, 2014

White Collar Roundup - November 2014

DOJ's 10 Hallmarks of a Good Compliance Program

In a speech at an ethics and compliance conference in Atlanta, GA, Leslie Caldwell, Assistant Attorney General for the Justice Department's Criminal Division, articulated 10 hallmarks of a good internal compliance program. Although the hallmarks were somewhat predictable (number one is "tone at the top"), Caldwell set forth several examples of actions to avoid (firing low-level employees but not their bosses, who may have directed the conduct) and actions to embrace (assigning responsibility to senior executives for implementing and overseeing a company's compliance program). She also gave suggestions on how a company can cooperate fully with the government, noting, for example, that withholding documents based on a broad reading of foreign data protection laws is likely to prevent full cooperation credit.

More DOJ Thoughts on Compliance

At yet another speech on ethics and compliance, Marshall Miller, Principal Deputy Assistant Attorney General for the Justice Department's Criminal Division, emphasized that a company's "culture of compliance" must extend beyond U.S. borders. Miller cited the cases brought against BNP Paribas, Credit Suisse, HSBC and Standard Chartered, in which foreign bank employees explicitly circumvented U.S.-based compliance policies. In that connection, Miller noted, even when a company has good compliance policies, failing to monitor or test adherence to those policies exposes the company to great risk. Miller also cited the case of Weatherford International, a Swiss oil company listed on the NYSE that pleaded guilty to violations of the FCPA and export control laws. One of the most glaring compliance problems, Miller noted, was Weatherford's failure to translate its compliance policy into languages other than English, despite having subsidiaries and operations in more than 100 countries around the world.

Conviction Based on "Russian Facebook" Page Vacated

On October 3, 2014, the U.S. Court of Appeals for the Second Circuit vacated the conviction of Aliaksandr Zhyltsou on charges of unlawfully transferring a false identification document. At trial, in support of its contention that Zhyltsou used the moniker "Azmadeuz," the government offered into evidence a printed copy of a webpage, which it claimed was Zhyltsou's profile page from VK.com, "the Russian equivalent of Facebook." Zhyltsou objected that the page had not been properly authenticated under Rule 901 of the Federal Rules of Evidence. The district court admitted the document over Zhyltsou's objection. The Second Circuit held that the district court erred because the government had not presented sufficient evidence that Zhyltsou had created the profile page or was responsible for its contents. The Second Circuit noted that the information contained on the profile page was general and known by individuals who may have had reasons to forge the page and attribute it to Zhyltsou, and that there was no evidence that identity verification was necessary to create a page with VK.

Challenges to Constitutionality of SEC ALJ Proceedings

Two lawsuits recently filed in the Southern District of New York argue that SEC administrative proceedings violate Article II of the U.S. Constitution, which provides that the "executive Power shall be vested in a President of the United States of America." In *Stillwell v. SEC*, the plaintiff argues that SEC Administrative Law Judges (ALJs) are executive branch officers within the meaning of Article II and thus may not be separated from presidential supervision and removal by more than one

layer of tenure protection. In violation of that standard, the plaintiff argues, SEC ALJs enjoy two or more layers of tenure protection. In *Peixoto v. SEC*, the plaintiff makes the same constitutional argument, and further asserts that the SEC sued him administratively because it could not win at a jury trial in light of the weak evidence and novel application of the insider trading laws.

No Harm Required to Prove Honest-Services Fraud

The Seventh Circuit in *United States v. Nayak* defined the scope of prosecutions for private-sector honest-services fraud. Raghuveer Nayak pleaded guilty to mail fraud for bribing physicians in exchange for referrals to his outpatient surgery centers. In the plea agreement, the government agreed to let Nayak appeal the conviction and argue that "the indictment was legally insufficient because the government did not allege that his conduct caused or was intended to cause tangible harm to any of the referring physicians' patients." The government did not allege that Nayak's scheme resulted in any tangible harm to the patients in the form of either higher costs or inferior care. After noting that honest-services mail fraud focused on "the defendant's benefit" and not the victim's harm, the court rejected Nayak's argument. It held that "actual or intended tangible harm is not an element of the offense of honest-services mail fraud." Therefore, it affirmed.

Reality TV Can Be Taxing

The U.S. Attorney's Office for the District of New Jersey has its hands full with reality TV stars with tax problems. And some are faring better than others?- for now. Teresa Giudice, who was a "Real Housewife of New Jersey," lost her bid to convert 12 months of her 15-month sentence for tax evasion from incarceration to home confinement. Meanwhile, Mike "The Situation" Sorrentino, who lived on "Jersey Shore," was released on $250,000 bail in advance of his tax-evasion trial due to begin in December. One thing is clear: If you are paid millions of dollars to be on a reality show, file accurate tax returns.