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White Collar Roundup - November 2016

DOJ Guidance on Export Control Self-Disclosure

The National Security Division (NSD) of the U.S. Department of Justice (DOJ) released Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations. The "NSD has made it a priority to pursue willful export and sanctions violations by corporate entities and their employees." In that vein, it issued this guidance to help companies understand the benefits of voluntary self-disclosures of improper conduct because "business organizations and their employees are at the forefront of [NSD's] enforcement efforts." The guidance is similar to other DOJ guidance regarding self-disclosure programs and relies heavily on the November 2015 revisions to the Principles of Federal Prosecution of Business Organizations that are set forth in the U.S. Attorneys' Manual §§ 9-28.000, 9-28.900. Most illuminating are the four hypothetical examples provided at the end of the guidance. Each sets forth a series of events and ties the benefits of an organization's self-disclosure to the timeliness of the disclosure and the extent of the cooperation.

Internal Investigation of Alleged Sexual Assault Not Privileged

In the wake of a reported sexual assault, the attorneys for Phillips Exeter Academy hired attorney Kai McGintee as an "independent investigator" to "perform an investigation into" the complaint of the alleged victim, Jane Roe. Ms. McGintee interviewed witnesses, including students, and prepared two reports for the school and its outside counsel. In those reports, Ms. McGintee recounted her findings and conclusions. The school ultimately placed the alleged assailant, John Doe, on leave and requested that he withdraw from the school. His parents sued the school and, in discovery, sought the McGintee reports. Phillips Exeter moved for a protective order on the basis that the reports were protected by the attorney-client privilege. In his decision on that motion, U.S. District Judge Joseph N. Laplante of the District of New Hampshire held that the report was not privileged. He reasoned that the report was commissioned not by Phillips Exeter but by its outside counsel. Further, while the school claimed the report was designed to provide legal advice, Judge Laplante found that it (1) contained factual findings and (2) provided business advice, neither of which is protected by the privilege. Weighing heavily in Judge Laplante's conclusion was the fact that Ms. McGintee was repeatedly referred to as an "independent investigator" or an "external investigator" and not as a lawyer who was hired to provide legal advice to the school. Finally, and perhaps significantly, Judge Laplante concluded that even if the reports had been privileged, the school waived that privilege by disclosing portions of them to John Doe's parents when justifying the discipline imposed on him.

But Disclosure of Internal Investigation of Alleged Accounting Fraud to SEC Not a Work-Product Waiver

In *In re Symbol Technologies, Inc. Securities Litigation*, pending in the U.S. District Court for the Eastern District of New York, Magistrate Judge A. Kathleen Tomlinson held that the plaintiffs were not entitled to documents from an internal investigation into possible violations of the securities laws that the defendants provided to the Securities and Exchange Commission (SEC). In the case, the plaintiffs filed a motion to compel the production of certain documents related to an internal investigation conducted by attorneys for Symbol regarding its alleged misstatement of revenues. Symbol objected, arguing that the documents were protected by the work-product doctrine. The plaintiffs argued that the doctrine was inapplicable because the documents were prepared not in anticipation of litigation but to discover what had happened. They further argued that even if the doctrine did apply, Symbol waived its protection by disclosing the documents to the SEC. The court found that the documents were entitled to protection under the work-product doctrine because the investigation was

influenced by the expectation of litigation. The court also rejected the plaintiffs' waiver argument, noting that "based on the facts of the instant case, the Court finds that Symbol and the SEC shared a common interest in ensuring that the terms of the [previously entered] consent judgment were adhered to and that Symbol's accounting practices . . . were sound."

What Does a Criminal Defendant Have to Do to Get a Subpoena Response?

Michael Rand filed a petition for certiorari with the U.S. Supreme Court in the wake of the U.S. Court of Appeals for the Fourth Circuit's judgment affirming his conviction. Mr. Rand seeks review on two questions: (1) "[w]hether a criminal defendant seeking pretrial production of documents from a third party by subpoena under Federal Rule of Criminal Procedure 17(c) must satisfy the heightened standard applied in *United States v. Nixon*, 418 U.S. 683 (1974)—a question that *Nixon* expressly left open"and (2) "[w]hether the principles of loss causation" that apply to civil securities cases "apply in federal criminal cases when a defendant's guidelines sentence is based on calculating losses to investors," which is subject to a circuit split. The petition is notable for a few reasons. The first is that the counsel of record is former Solicitor General Seth P. Waxman. The second is that it addresses one of the most frustrating aspects of federal criminal defense: the inability to obtain evidence from third parties. As any seasoned federal criminal defense attorney knows, *Nixon* severely limits the permissible scope of a Rule 17(c) subpoena, and courts often hold defendants to that standard when ruling on motions to quash such subpoenas. While the odds of the Supreme Court's granting cert are pretty slim, this one might have a better chance than most.

What Goes Around . . . Former IRS Special Agent Charged for Tax Fraud

Benjamin Franklin famously said, "In this world, nothing can be said to be certain, except death and taxes." The Internal Revenue Service (IRS) is charged with ensuring the latter. To do so, it employs special agents to investigate people for undertaking criminal efforts to shirk their responsibilities to pay. One such special agent, Alena Aleykina, was recently indicted for her own criminal conduct. The government alleges she "claimed false filing statutes, dependents, deductions and losses" for certain tax years. For other tax years, the indictment alleges, she "attempted to obstruct the IRS by preparing false tax returns for herself, family members, trusts and partnerships and by making false statements to representatives of the Department of the Treasury." The indictment also alleges she "attempted to obstruct a federal investigation by destroying evidence on a government computer." Undoubtedly, those defendants she helped prosecute have discovered an extra spring in their step. Here is a link to DOJ press release.

A New Justice League: Banks Join Forces to Fight Cybercrime

Hacking and cyberattacks are becoming more and more prevalent. In response, eight of the largest banks in the United States are coming together to tackle the threat. According to a report, the group plans to "share more information with each other about cybercrime threats, prepare comprehensive responses for when attacks occur and conduct war games designed for the issues facing the biggest institutions." While the banks are part of a wider group dedicated to fighting such attacks, the bank-only group is coming together because the banks see themselves as "more likely" targets of such attacks. Hopefully, this new Justice League will have success against the likes of Lex Luthor and the rest of the Legion of Doom.

New York Fed Presses Banks to Dispose of Culture of Silence

The New York Federal Reserve Bank held a forum on improving bank culture. The goal of the forum was to address the "deep-seated cultural and ethical problems" that "have plagued the financial services industry in recent years," according to William C. Dudley, president and chief executive officer. He noted that these issues have "eroded the industry's trustworthiness," which "impedes the ability of the financial services industry to do its job." And what is that job? "[F]inancial intermediation—to facilitate the efficient transfer of resources from savers to borrowers, and to help customers manage the financial risks they face." Further, Mr. Dudley expressed his "worry that, in the long term, an industry that develops a reputation for dubious ethics will not attract the best talent." He also urged that a more trustworthy financial sector would be "more productive and better able to support the economy." Among the speakers at the forum was Preet Bharara, the U.S. Attorney for the Southern District of New York. For the text of Mr. Dudley's opening remarks, click here.

Sour Grapes? DOJ Seeks Full-Court Review in Microsoft Case

Further to our earlier report, the Department of Justice has sought rehearing before the *en banc* Second Circuit in response to the panel's decision to prohibit the government from using a search warrant to obtain information about a third-party account holder whose data the company maintains overseas. In its petition, the government argues that the panel made two mistakes. First, it argues that the panel improperly focused on the storage of the emails, which occurs overseas. The government claims this is erroneous because the focus of section 2703 of the Stored Communications Act is on *disclosure* of the stored information, which occurs in the United States. Therefore, according to the government, the panel erred in its extraterritoriality analysis. Second, the government argues that the panel "contravenes" the will of Congress that disclosure of stored communications be permitted to further criminal investigations. Pursuant to the local rules of the Second Circuit, no response is required "unless the court orders." Stay tuned . . .

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