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White Collar Roundup - October 2015

Individuals, Individuals, Individuals

The biggest news from the past month (as far as the *WCR* is concerned) arrived on September 9, when Deputy Attorney General Sally Quillian Yates issued a memorandum to all federal prosecutors, called "Individual Accountability for Corporate Wrongdoing." The "Yates Memo" sets new goals for the Department of Justice (DOJ) to "combat corporate misconduct ... by seeking accountability from the individuals who perpetrated the [organization's] wrongdoing." The DOJ had not been ignoring the prosecution of individuals in the past, but the Yates Memo expressed an aversion to allowing organizations to simply pay a fine and move forward. Although the DOJ will certainly continue to seek fines from organizations, prosecutors are now instructed that "[c]orporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires." Prosecutors also must obtain supervisory approval for "declinations as to individuals," which "must be memorialized." Is this a response to criticism of past prosecution trends, a revolution in how investigations will unfold, or a little of both? Only time will tell. Click here for the memo. Click here or here for news articles about it.

No Retaliation Against Whistleblowers, but Only If They Tell the SEC

The U.S. Court of Appeals for the Second Circuit in *Berman v. Neo@Ogilvy LLC* confronted the question of whether the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) apply to whistleblowers who report violations internally but not to the SEC. In the case, plaintiff Daniel Berman brought a wrongful-termination action against his employer, Neo@Ogilvy LLC, alleging it violated the anti-retaliation provisions of Dodd-Frank when it fired him for internally reporting possible accounting fraud. Berman never reported anything to the SEC before his termination. The district court granted Neo@Ogilvy's motion to dismiss for failure to state a claim on the basis that Dodd-Frank's anti-retaliation provisions apply only when the retaliation is against an employee-whistleblower who made a report to the SEC. Berman appealed to the Second Circuit, which held in a split decision that "the pertinent provisions of Dodd-Frank create a sufficient ambiguity to warrant our deference to the SEC's interpretive rule, which supports Berman's view of the statute."

Sunken Ships, Misstatements and the Crime-Fraud Exception

The First Circuit in *In re Grand Jury Proceedings* emphasized the importance of providing a privilege log in response to a grand jury subpoena. The case arose from a subpoena issued to the attorneys for a target of a fraud investigation. The purported fraud involved the salvage of a ship that had been sunk or destroyed during World War II. The government contended the target had falsified the entries for the sunken vessel in the famed *Lloyd's War Losses*, which is a compendium of lost ships and their likely cargo. The original entry in *Lloyd's* listed the ship's cargo as "1600 tons of automobile parts & 4000 tons military stores." The target had allegedly altered the entry to include in the ship's cargo "1,707,000 troy ounces of platinum" and also told potential investors it possibly contained "ten tons of gold bullion." During its investigation, the government moved for an order to compel production of files withheld on the basis of privilege in light of the crime-fraud exception. The target asked the court to conduct an *in camera* review of documents alleged to fall outside any possible crime-fraud exception. The district court refused to conduct any *in camera* review, held that the exception applied and ordered the documents produced. On appeal, the First Circuit affirmed. In doing so, it noted that because the target never provided a privilege log, which is required by Federal Rule of Civil Procedure 45(e)(2)(A), he waived any request for *in camera* review.

SEC Loses Enforcement Action

The SEC faced a rare setback in an ALJ's decision in *In re Ruggieri*. The SEC brought an administrative proceeding against Joseph C. Ruggieri, alleging he had engaged in insider trading. The ALJ had previously held that the Division of Enforcement had to establish that the tipper tipped Ruggieri in exchange for "a personal benefit in accordance with *Newman*." The ALJ then gave the Division an opportunity to meet that burden by holding a 12-day hearing. After the hearing, the ALJ determined the Division had failed to prove by the preponderance of the evidence that the tipper received a personal benefit. As a result, the ALJ dismissed the action against Ruggieri. The Division has 21 days to file a petition for review of the decision.

SEC Administrative Proceedings Might Be Curtailed

The *New York Times* suggested the SEC's ability to use its administrative arm to adjudicate enforcement actions might be curtailed because some federal courts have bristled at the practice. Dodd-Frank authorized the SEC to bring almost any case in its own administrative forum rather than in federal district court. Several defendants have asserted that the administrative procedures available in such a forum violate their due process and equal protection rights. The SEC has won some of these challenges and lost others. Perhaps in reaction to the criticism, the SEC has proposed changes to its administrative procedures to "modernize" its rules of practice. It proposes to adjust the timing of administrative proceedings, permit parties to take depositions and require electronic filing. It is unclear whether these proposed adjustments will change the minds of federal judges who have prohibited the SEC from proceeding administratively. The SEC will publish the proposed changes in the *Federal Register* and will seek comments on them for 60 days.

Justice Is Not for Sale

So say Senator Bernie Sanders, I-Vt., and other sponsors of legislation (called the Justice Is Not for Sale Act) introduced in Congress to ban private prisons, reinstate the federal parole system and eliminate quotas of immigrants held in detention. Senator Sanders contends our criminal justice system has suffered because "corporations are allowed to profit from mass incarceration" and calls for an end to "the private prison racket in America." He extols the importance of "treating people with dignity and ensuring they have the resources they need to get back on their feet when they get out." Click here to read the bill.