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White Collar Roundup - January 2019

First Step Act Becomes Law

While focused more on street crime, the First Step Act brings a bevy of changes to sentencing and incarceration in the federal system. Of note for purposes of the *White Collar Roundup* are the changes to the number of days off a sentence an inmate will receive for good behavior. The act increases it from the 47 days per year that the Bureau of Prisons (BOP) allows to 54 days per year. In addition, most offenders—including almost all offenders convicted of financial crimes—will be able to obtain early release from custody. Further, the BOP has now directed that it "shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under" 18 U.S.C. § 3624(c)(2). That section currently allows the BOP "to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." With the addition of the new language, most white collar offenders should end up spending more of their sentence in home confinement.

DOJ Rescinds 69 Guidance Documents

Under President Trump, the Department of Justice (DOJ) has eschewed regulating the manner in which it would enforce the law through the use of so-called "guidance documents." At a speech in November 2017, then-Attorney General Jeff Sessions said, "Too often, rather than going through the long, slow regulatory process provided in statute, agencies make new rules through guidance documents—by simply sending a letter." He said this practice violates the Administrative Procedure Act and "cuts off the public from the regulatory process by skipping the required public hearings and comment periods—and it is simply not what these documents are for. Guidance documents should be used to reasonably explain existing law—not to change it." In line with that pronouncement, Acting Attorney General Matthew Whitaker announced that the DOJ was rescinding 69 guidance documents in accordance with President Trump's earlier Executive Order 13777. In doing so, Whitaker said, "Under the Constitution, Congress writes our laws and the Executive Branch carries them out. Congress has given us a specific process for implementing regulations, and we have to follow it. Unfortunately, not every previous Administration has done that, and some have overstepped their lawful authority by issuing guidance documents that impose new obligations on parties outside of the Executive Branch and go further than existing law allows. The Trump Administration has already rescinded dozens of guidance documents that were improper, outdated, unnecessary, or inconsistent with current law, and today we are rescinding dozens more. We will continue this effort to restore the rule of law and our constitutional order because this government is accountable to the American people." To see the list of what was rescinded, click here.

Federal False Claims Act Recoveries Decline

As announced here, the DOJ recovered only $2.8 billion from settlements and judgments in civil False Claims Act (FCA) cases. As reported here, that amount, while a large number, is the lowest amount since 2009. Last year, for example, the DOJ announced FCA recoveries for fiscal year 2017 of $3.47 billion. Nonetheless, the government is still heavily focused on the healthcare industry. The DOJ noted, "Of the $2.8 billion in settlements and judgments recovered by the Department of Justice this past fiscal year, $2.5 billion involved the healthcare industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians." This the ninth straight year in which healthcare-related FCA recoveries topped $2 billion.

Equifax Insider Trading Case Heading to Trial

U.S. District Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia recently denied defendant Jun Ying's motion to dismiss the insider trading indictment against him. As some may recall, Ying was the chief information officer of Equifax Inc. when it experienced its massive data breach. Ying was tasked with working on a data breach issue "involving a potential Equifax customer, though [he was] actually assisting in the response to a breach of Equifax's entire system." Ying figured it out and then did some research about the change in stock price Experian had experienced after its 2015 breach. Less than an hour later, Ying exercised all his Equifax options and sold them, earning a profit of over $480,000. Nine days later, Equifax publicly disclosed the breach. Ying was investigated for insider trading and indicted on one count of securities fraud, in violation of 18 U.S.C. § 1348, and one count of insider trading, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. §§ 240.10b-5 and 240.10b5-1. Ying moved to dismiss the indictment, a feat as likely to succeed as Don Quixote's pursuits, arguing in part that it was insufficient in light of the Eleventh Circuit's requirement from *SEC v. Adler* that a defendant "use" the inside information to prove insider trading. While she rejected the defendant's argument, Judge Totenberg noted that, at trial, "the Government will have to establish sufficient evidence to demonstrate defendant's willful 'use' of a deceptive scheme to engage in the stock option trades at issue in violation of § 78j(b) and §77ff [*sic*]." She also noted, "Defendant will have the opportunity to present evidence and rebut any inference that Defendant used the information of the data breach when he traded, as provided by *Adler*."

Grand Jury Leak Doesn't Change a Thing

As we reported here, during the grand jury investigation of William Walters for securities fraud, an FBI agent leaked information about the grand jury proceedings in violation of Federal Rule of Criminal Procedure 6(e), which imposes on federal agents an obligation to keep such proceedings secret. After he was indicted, Walters moved to dismiss the indictment on the basis of the leak, which violated Rule 6(e) and the Fifth Amendment's Due Process Clause. The district court denied his motion. At trial, Walters was convicted and appealed. His appeal raised several issues, including that the district court erred by not dismissing the indictment. In *United States v. Walters*, the U.S. Court of Appeals for the Second Circuit criticized the agent's "highly improper" misconduct. It wrote, "The leaking of confidential grand jury information to members of the press, whether to satisfy public interest in high profile criminal prosecutions or to generate evidentiary leads, is serious misconduct and, indeed, likely criminal." Regardless, however, the court affirmed the conviction. In doing so, it noted that dismissal of an indictment is appropriate "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." And in this case, it concluded that "Walters has not demonstrated that he was prejudiced by [the FBI agent's] actions." It also concluded that he should not receive the windfall that would come with the dismissal of the indictment when there were other, less drastic remedies for the misconduct, such as the independent investigation and possible prosecution of the leaking agent.

Loss Calculation Is as High as It Ever Was

In *United States v. Hirst*, the U.S. Court of Appeals for the Second Circuit summarily rejected defendant Gary Hirst's arguments about the district court's calculation of the loss amount applicable to his offense under the U.S. Sentencing Guidelines. Hirst was convicted at trial for conspiracy, securities fraud and wire fraud. The government introduced evidence that Hirst's co-conspirators created a special purpose company, called Gerova, that traded on the American Stock Exchange. In the scheme, the conspirators created fraudulent documents authorizing the sale of millions of dollars of Gerova stock to Ymer Shahini, a citizen of Canada and Kosovo. The shares generated proceeds of more than $19 million before Gerova was delisted. At Hirst's sentencing, the district court calculated the loss amount as between $25 million and $65 million, which resulted in an increase of 22 levels under the Guidelines. The district court based its finding on the "average price of the security during the period of the fraud and the average price during the period following disclosure, multiplied by the number of shares outstanding." On appeal, Hirst argued the loss should be calculated as only $1.1 million "because the shares issued by Hirst could not be sold in the U.S. for a certain time period and thus were worth substantially less than they would have been if freely transferable in U.S. markets." The Second Circuit disagreed. It reasoned that Guidelines § 1B1.3(a)(1)(B) attributes to co-conspirators "all acts and omissions of others that were . . . (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with the criminal activity." As a result, because Hirst knew the purpose of creating the fraudulent documents was to eventually sell the shares, his conduct satisfied § 1B1.3(a)(1)(B) and he was responsible for the entire loss amount.

Healthcare Broker Arrested for Creative Fraud

An insurance broker in New Jersey was arrested for conspiring to defraud three Blue Cross Blue Shield (BCBS) affiliates in Pennsylvania and Washington, D.C. According to the press release and criminal complaint, the defendant, Jonas Knopf, was the chief executive officer of Madison Financial Services (MFS). The U.S. Attorney's Office for the District of New Jersey alleges that Knopf and others created 11 fictitious companies under the MFS banner solely to collect insurance coverage premiums and fees for Knopf's alleged services for the fake employees at these companies. Knopf would then obtain coverage for Lakewood, NJ, residents who were seeking insurance coverage for which they weren't eligible. These residents paid Knopf inflated insurance premiums for BCBS plans and thus provided him payroll money. He issued bogus payroll checks to them to create the false impression they were working for these sham companies.

The Apparent Bright Side of the GDPR

According to this article, after seven months of living with the General Data Privacy Regulation (GDPR) in Europe, cybersecurity improvements are evident. According to BitSight, a security rating and risk management firm, there was "a steady decrease in security performance across all regions of the globe," but "organizations within continental Europe actually improved their security performance over the last year." It also noted, "The regulation appears to have inspired European companies to really get their act together in the last months before the GDPR took effect, according to the BitSight data, which also could be the reason for the EU's cybersecurity improvement in the months after." And it appears that the "severe financial penalties companies stand to incur if they don't comply" with the GDPR might have prompted the heavy investment in programs and processes causing a more effective cybersecurity regime. Of course, this could all be a fluke, but "it seems more likely the improvement was due to the enactment of the law and the companies' concern with compliance."

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