LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin®

An ALM Publication

Volume 17, Number 7 • March 2010

Justice Department Issues Guidance On Discovery

By Jonathan A. Vogel and Elizabeth M.Z. Timmermans

In the wake of a high-profile case that highlighted discovery abuses by federal prosecutors, the Department of Justice (DOJ) issued guidance regarding the government's discovery obligations on Jan. 4, 2010.

Federal Discovery Law

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that suppression by prosecutors of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court later extended this constitutional duty of disclosure to include exculpatory information regarding the credibility of government witnesses. *Giglio v. United States*, 405 U.S. 150 (1972).

Beyond these constitutional requirements, the Federal Rules of Criminal Procedure delineate the government's discovery duties. The government must disclose, upon the defendant's request, any statement made by the defendant; the defendant's prior criminal record; documents and objects material to the defense that the government intends to use at trial and items belonging to the defendant; certain reports and examinations; summaries of

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Feds to Corporate America: 'The Cops Are Coming'

By Laurence A. Urgenson, Samuel G. Williamson and Audrey L. Harris

On Jan. 19, the Department of Justice (DOJ) announced the arrest of 22 individuals as part of a "sting" operation aimed at uncovering violations of the Foreign Corrupt Practices Act (FCPA). As intended, the case got a great deal of publicity due to both the large number of individuals arrested and the manner in which the investigation was handled.

The message delivered personally by Lanny Breuer, the Assistant Attorney General for the Criminal Division who oversees FCPA prosecutions, was clear: "We are going to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

When combined with the use of wiretaps in the Galleon hedge fund prosecutions in New York, a series of large health care fraud "takedowns" (arrests) by a DOJ "Strike Force," and the SEC enforcement chief's public statements about DOJ-like cooperation incentives for individuals, it becomes clear that the government enforcement community is taking a more aggressive approach toward white-collar prosecutions — one that focuses on large takedowns, individual prosecutions, and law enforcement techniques rather than relying on companies to self-report and conduct internal investigations. As a result, senior company leadership will likely need to refocus the manner in which they deal with DOJ investigations and corporate criminal liability.

The FCPA Takedown

On Jan. 19, the DOJ unsealed indictments of 22 individuals, all of whom worked in sales of products for military or law enforcement use. The indictments were the result of a six-month undercover operation in which an FBI agent posed as a representative of the government of Gabon. The agent worked with an informant (who has been reported in the press to be Richard Bistrong) with strong industry ties. Together, they allegedly struck deals with the individuals, in which the defendants agreed to pay the undercover agent a 20% commission, of which 10% was allegedly represented as destined for Gabon's Minister of Defense.

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All but one of the defendants were arrested during the industry's biggest trade show, a move that appears designed to maximize the shock factor attending the arrests. Moreover, this takedown occurred during a period when the leadership of DOJ's Criminal Division and Fraud Section has stated publicly that it intends to bring more enforcement actions against individuals. These prosecutions appear aimed in part at turning individual defendants against their corporate employers.

The Galleon Case

In the Galleon case, the U.S. Attorney's Office for the Southern District of New York has arrested at least 15 individuals. One notable aspect of this prosecution has been the Office's use of wiretaps. That Office has long prided itself on using wiretaps and other aggressive techniques in white-collar cases. For example, in 2000 "Operation Uptick" resulted in the arrest of 120 defendants on charges of securities fraud and related crimes. A large number of the defendants appeared to be typical "white-collar" defendants who worked at financial institutions in New York and around the country; others were alleged to have been corrupt union officials or members of organized crime groups, including at least one reputed "Capo" in the Bonnano family. At the time, the arrests were heralded for their breadth and aggressive techniques, which involved an FBI infiltration of an investment banking firm. Nevertheless, the use of those methods in the Galleon case has garnered a great deal of publicity, and U.S. Attorney Preet Bharara called their use in Galleon "unprecedented." In addition to the Galleon employees who were arrested, the government charged two outside professionals — a Ropes & Gray associate and a McKinsey consultant — with violating the federal securities laws.

The Health Care Strike Force Takedowns

The DOJ has also been taking an increasingly aggressive approach to health care fraud. In May 2009, it established the Medicare Strike Force, under the leadership of the Fraud Section, to combat fraud against the Medicare program, false claims and improper kickbacks. As part of the program, the government says that it has arrested hundreds of individuals in the health care industry, with charges being brought in Detroit, Houston, Miami, Boston, Louisiana and New York. In a number of the press releases trumpeting these actions, the DOJ stated that the arrests had occurred during "early morning takedowns," indicating that the defendants were taken by surprise, in contrast to the classic model of white-collar enforcement involving lengthy negotiations with the government before charges are filed.

The SEC's Individual-Cooperation Initiatives

In an Aug. 5, 2009 speech, the SEC's chief of enforcement, Robert Khuzami, announced that his enforcement team would begin offering DOJ-style "cooperation agreements" to individuals, with the goal of giving them incentives to cooperate with division investigations. The incentives could include items like DOJ-style deferred-prosecution agreements or SEC-sponsored immunity applications to the DOJ.

Khuzami's speech was followed up in January 2010 with the SEC's Enforcement Manual, which included specific parameters for the cooperation, including the concept of "substantial assistance" borrowed from the Sentencing Guidelines and the adoption of DOJ-like tools such as proffer, cooperation, deferred prosecution, and non-prosecution agreements. Given Khuzami's background

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Business Crimes Bulletin®

Business Crimes Bulletin® (ISSN 1090-8447) is published by Law Journal Newsletters, a division of ALM.

Business Crimes Bulletin P0000-245
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to :
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

Heightened FCPA Exposure for Executives

By Brian Whisler

Government standards and expectations should be consistent and predictable. In enforcement of the Foreign Corrupt Practices Act (FCPA), however, the standards are continuously evolving, leaving corporate executives increasingly preoccupied with how prosecutors and regulators might view their activities. Some executives say this issue keeps them up at night.

For purposes of assigning criminal or civil liability, guilty knowledge — the starting point for any criminal prosecution — must be demonstrated by direct or circumstantial evidence. Yet, in the vigorous quest to deter global corruption, the Department of Justice (DOJ) and SEC appear to be loosening the knowledge requirement in order to hold corporate executives personally accountable for the actions of others in the corporate organization.

FCPA enforcement in 2009 was notable in several respects, including:

- the record-breaking Siemens settlement (over $1 billion in aggregate fines and penalties in global settlement with U.S. and German authorities;
- the DOJ's success in each of its three high-profile individual FCPA trials (*Bourke*, *Jefferson*, *Greens*); and
- the SEC's renewed commitment to criminal enforcement.

Taken together, these events clearly signal that that the current wave of aggressive enforcement has not crested and, according to recent public pronouncements from DOJ and SEC officials, is not expected to do so anytime soon.

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Unprecedented Efforts

In the midst of these developments over the past year, unprecedented efforts have emerged to hold corporate executives accountable with minimal regard for the degree of knowledge or culpability. First, the prosecution of Frederic Bourke, co-founder of handbag maker Dooney & Bourke, demonstrated the DOJ's zeal for pursuing corruption. After being indicted in 2005, Bourke was tried and convicted in the summer of 2009 for his role in a conspiracy involving a failed effort to bribe government officials in Azerbaijan to gain control of the state-owned oil company, SOCAR. Bourke lost $8 million of his own money, and there was no attempt by DOJ to prove that Bourke had directly engaged in any bribery or that Azeri officials were complicit in the failed scheme. Instead, the government's proof centered on Bourke's failure to act in response to his knowledge of the allegedly corrupt political environment and Bourke's knowledge of the actions of others who were alleged to be acting on his behalf.

The jury in Bourke's trial was instructed that knowledge could be established if the government demonstrated that Bourke suspected a fact pointing to bribery, realized its high probability, but refrained from obtaining the final confirmation because he wanted to attain plausible deniability. In the end, Bourke's failure to confirm certain suspect facts was effectively deemed criminally negligent by the jury, as evidenced by one juror's post-trial remarks that it was Bourke's job as a sophisticated investor and executive to know all the facts. Addressing Bourke's motion for a judgment of acquittal, Judge Scheindlin ruled that there was sufficient evidence for the jury to find a "high probability that payments to Azeri officials were illegal and that Bourke deliberately avoided confirming this fact."

Among other things, the court found that Bourke and his co-conspirators deliberately structured their involvement in the Oily Rock venture so that they wouldn't learn about Kozeny's corrupt dealings. Overall, Bourke's willful blindness to evidence of Kozeny's suspect business practices and failure to conduct further due diligence earned Bourke a sentence of 13 months in prison and a $1 million fine. His direct appeal of his conviction and sentence is pending in the Second Circuit.

Another Example

In a clearer foreshadowing of things to come, the SEC took a decidedly novel approach in its recent enforcement action brought against Nature's Sunshine Products Inc. ("NSP"), a manufacturer of nutritional and personal care products, and two of its high-level executives. The SEC complaint alleged that in 1999 and 2000, the Brazilian government reclassified NSP's herbal products, vitamins, and supplements as medicines, thereby requiring product registration prior to import and sale in Brazil. NSP's wholly owned subsidiary in Brazil was unable to meet the registration requirements and suffered steep losses — almost $20 million — between 2000 and 2003. In order to circumvent the strict registration requirements, the complaint alleged that NSP Brazil made over $1 million in undocumented cash payments to customs brokers, which were in turn improperly booked as "importation advances."

In addition to the FCPA anti-bribery and internal-controls allegations, the SEC charged Doug Faggioli, a current executive, and Craig Huff, a former executive, with internal-controls and books-and-records violations predicated on a "control theory" of liability under § 20 of the 1934 Securities and Exchange Act. During the time in question (2000 and 2001), Faggioli was COO and a board member, while Huff was CFO for NSP, thus giving them supervisory control over senior management and over the policies that governed

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FCPA Exposure

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the company's internal controls and books and records. At the core of the SEC's allegations was the executives' failure to supervise adequately the senior managers charged with maintaining accurate books and records and devising internal controls. Most notable was the lack of any allegation or evidence that Faggioli or Huff had any knowledge of the payments to Brazilian customs brokers.

Precedent and the 'Claw-Back' Provision

While there are ample civil enforcement actions holding companies strictly liable for books-and-records and internal-controls violations under § 13(b)(2)(B) of the Exchange Act, there does not appear to be any precedent for holding individuals strictly liable. To establish an individual's liability under § 13(b)(2)(B), generally he must be shown to have some degree of knowledge, such as that he knowingly evaded or failed to implement internal controls or falsified books and records. But here, the SEC relied on the rather novel "control person" theory under § 20(a), which essentially creates joint and several liability for the controlling party and controlled person, unless controlling parties can show that they acted in good faith and did not directly or indirectly induce the conduct at issue. While to date most executives have been held civilly liable under the FCPA only upon a showing of direct participation or aiding and abetting, the NSP enforcement action highlights what appears to be a trend toward strict liability for executives.

This same approach — punishing an executive absent a showing of any knowledge or culpability — was taken earlier this year in the SEC's effort to compel disgorgement of compensation from former CSK Auto Inc. executive Maynard Jenkins. Jenkins, who was not accused of any wrongdoing, was the first non-culpable individual to be subjected to the Sarbanes-Oxley § 304 "claw-back" provision holding executives accountable for returning compensation and stock sale profits received within 12 months after a company's restatement of its financials. The SEC sought an order to compel Jenkins to reimburse over $4 million in compensation and stock sale profits after CSK restated its financials following an alleged accounting fraud. Jenkins has challenged this ruling, correctly noting that "disgorgement" has generally been used as a remedy to recoup ill-gotten gains from persons engaged in wrongdoing.

What's Happening Abroad

Lest anyone think that movement toward strict liability is unique to U.S. regulators, authorities in the United Kingdom are currently advancing through Parliament a comprehensive anti-corruption measure, modeled after the FCPA, which would cover not only corrupt payments to foreign officials but also commercial bribery. Significantly, the proposed UK law would impose strict criminal liability for corporations which fail to prevent bribery committed by those acting on their behalf. Numerous other countries have devoted similar emphasis to anti-corruption policy in the wake of increased economic and political pressure.

With worldwide anti-corruption enforcement momentum at its peak, the stakes for global companies and high-level executives have never been higher. Corporate executives, therefore, have good cause for losing sleep over the evolving standards of anti-corruption enforcement here and abroad.

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as a DOJ prosecutor (he supervised the investigation of Operation Uptick), as well as his hiring of other former prosecutors from the Manhattan Attorney's Office into top positions (George Cannellos to head up the SEC's New York office and Lorin Reisner to serve as Khuzami's deputy in Washington), it seems clear that the SEC enforcement direction is veering strongly towards criminal prosecution.

Why the Change?

The government's most conspicuous recent white-collar successes, including the recent FCPA prosecutions of Siemens, Halliburton/ KBR, Daimler Chrysler, BAE Systems and Technip (itself an offshoot of the already massive Halliburton case), which have totaled more than $1.25 billion in penalty payments to DOJ alone and over $3 billion in total penalty payments to U.S. and foreign enforcement authorities, have an important common aspect: None of them were the result of voluntary disclosures by the companies. In addition, these recent successes have led to greater funding for more aggressive traditional investigations. Through this process, DOJ has learned that it does not need to rely on self-disclosures or corporate cooperation to make big cases. This is not just a change in tactics, but a difference in the way the government seeks to prevent and detect white-collar crime.

What Does All This Mean?

Over approximately the last two decades, corporate defendants were often able to get out in front of enforcement actions. Once they learned about their employees' misconduct, companies were able to conduct internal investigations, take remedial actions, and make decisions about disclosure to the government. Even in situations where companies elected not to disclose but the government learned of the conduct through its own investigations, the companies were in a position where they knew of the conduct in advance and had likely planned for the eventuality of DOJ discovering it.

Contrast that with the current circumstances, where boards and executive leadership learn of misconduct

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IN THE COURTS

NINTH CIRCUIT: WIRE FRAUD CONVICTION NEED NOT INCLUDE SHOWING OF CONDUCT VIOLATING OTHER STATUTE OR REGULATION

The Ninth Circuit recently affirmed the district court's conviction of Judy Green on wire fraud, bid rigging, conspiracy to commit bid rigging, and conspiracy to commit wire fraud. *United States v. Green*, 2010 WL 200280, (9th Cir. 2010).

Green, a former school teacher, ran a business that helped low-income schools apply for and obtain a certain type of technology subsidy ("E-Rate") provided by the FCC. As a part of the program, schools applied for a grant and, if successful, were awarded a portion of the total cost of their technology program. Even with the award, each school had to pay a portion of the costs. Once awarded, the school received bids from third parties and selected a winner.

Green obtained clients by offering to help the schools avoid their portion of the co-payment for the equipment and by getting contractors to donate additional items outside the scope of the award. Green then approached contractors to identify those who would supply the appropriate materials and free "bonus" items. Once the application was in, those contractors would submit bids to the schools based on the specifications they had already agreed to with Green. These bids were inflated to cover the extra costs. Green then adjusted materials supplied to the FCC to conceal the extras and instructed the schools to tell the FCC that they planned to pay the additional co-payment, even though they did not.

Green was indicted and convicted on 22 counts of wire fraud, bid rigging, and conspiracy. The district court sentenced her to 90 months in prison.

On appeal, Green argued that her conviction should be overturned because the E-Rate rules and regulations did not specifically prohibit her conduct. The Ninth Circuit reviewed the relatively few cases addressing similar questions and found that the government need not show that the defendant violated some other statute or regulation, in addition to proving the elements of wire fraud (which it did). The court rejected Green's attempts to analogize to honest services fraud, finding that, "where, as here, financial harm to the victim is an integral part of the offense, there has never been any suggestion that a further limitation on the fraud statutes is required."

Reviewing the facts in some detail, the Ninth Circuit also rejected the defendant's claim that there was insufficient evidence to convict. The panel also rejected Green's challenges to her jury instructions, finding that a "mailing" need not be sent by a co-schemer to provide a predicate for mail fraud. Although the court's instruction on foreseeability of co-schemer actions was incorrect — and the Ninth Circuit found that vicarious liability under the fraud statutes required a showing that the co-schemer's action was foreseeable to the defendant — such error was harmless.

FAX SENT BY VICTIM SUFFICIENT TO ESTABLISH WIRE FRAUD

The Fifth Circuit has affirmed the district court's conviction of James Ray Phipps for mail fraud, wire fraud, aiding and abetting, corrupt endeavoring to obstruct and impede the internal revenue laws, and income tax evasion. *United States v. Phipps*, 2010 WL 254983, (5th Cir. 2010).

Phipps operated Life Without Debt, a pyramid scheme that convinced investors to provide thousands of dollars and recruit other investors, while providing them with anti-tax literature and telling them that the proceeds from the program did not need to be reported to the IRS. Overall, Phipps made approximately $4.6 million from the scheme, while less than one-tenth of his investors made any profit. After a jury convicted Phipps, he was sentenced to 210 months in prison.

On appeal, Phipps challenged the sufficiency of the government's evidence against him, specifically the evidence of intent. The Fifth Circuit found significant evidence of intent because Phipps had been warned by law enforcement on a number of occasions that his conduct (both in this and in prior, similar schemes) was illegal and fraudulent.

The Fifth Circuit also found that the only wire communication at issue in the case — a change-of-address fax sent to Phipps by a victim — was "caused" by Phipps because he provided the fax number. Even though the fax occurred after the alleged fraud, it was sufficiently "incident" to the scheme because a jury could find that getting updated address information was part of lulling a victim into the belief that there would be future payments.

CONVICTIONS BASED ON $40 MILLION PONZI SCHEME AFFIRMED

The Ninth Circuit has upheld the convictions and sentences of Randall Treadwell, Ricky Sluder, and Larry Saturday for wire fraud and conspiracy to commit wire fraud based on their involvement in an extensive Ponzi scheme. *United States v. Treadwell*, 2010 WL 309027, *1 (9th Cir. 2010).

The defendants made a variety of claims to investors about the sources of their investments and the potential returns, all of which were false. At trial the government showed that the defendants' accounts had no income other than from investors' funds and that the defendants undertook a number of measures to evade detection by authorities, including moving the operation off-shore and attempting to pay investors not to talk to the FBI. After trial, the defendants were

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In the Courts was written by Associate Editor **Kenneth S. Clark**, an Associate at Kirkland & Ellis LLP, Washington, DC.

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convicted on conspiracy and multiple wire fraud counts.

On appeal, two defendants claimed that the district court's failure to define "intent to defraud" as requiring an intent to cause financial loss violated their due-process rights. The Ninth Circuit rejected that argument, finding that the wire fraud language required only an intent to deprive, not an intent to cause loss. Further, that intent could be present even where the defendant intended to restore the property later.

Precedent, in the Ninth Circuit and elsewhere, supported that stance. Ultimately, depriving the victims of the opportunity to make their own investment decisions through misrepresentations was sufficient to establish an intent to defraud for purposes of the wire fraud statute.

The Ninth Circuit also dismissed the defendants' claim that the lower court erred in not finding the amount of fraud loss by clear and convincing evidence. The panel made clear that the loss need only be determined by the preponderance of the evidence. In addition, the panel found that the district court properly applied a two-level upward adjustment for fraud based on representations of acting on behalf of a charitable organization even though the defendants did not name a specific charity; their representations that investments would be used for "humanitarian causes" and to "help those in need" were sufficient. The defendants also claimed that their sentences exceeded what would be reasonable under 18 U.S.C. § 3553(a) based solely on the facts found by the jury, and thus violated the Sixth Amendment. The Court of Appeals found that the maximum sentence was defined by the statute. The review for reasonableness did not lower that statutory maximum; therefore the sentence did not violate the Sixth Amendment.

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Discovery Guidance

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expert witness testimony; and statements by government witnesses relating to trial testimony. Rules 16 and 26.2, Fed. R. Crim. P.

In addition, the Jencks Act, 18 U.S.C. § 3500, sets forth the procedure for turning over the statements of testifying witnesses. After a government witness testifies, the court "shall, on motion of the defendant, order the United States to produce any statement" in the government's possession relating to the testimony. If the entire statement is not relevant to the testimony, then the court must review the statement in camera and excise it. Should the government not comply with the court order, the court must strike the witness's testimony.

The U.S. Attorneys' Manual (USAM) encourages prosecutors to go beyond the minimum constitutional and statutory obligations and disclose any relevant exculpatory information reasonably promptly after the government discovers it and to disclose impeachment information at a reasonable time before trial. USAM § 9-5.001.D.

The Ted Stevens Case

In October 2008, a federal jury found former Senator Ted Stevens guilty of lying on a Senate disclosure form in order to conceal gifts from an oil executive and other friends. Amid heavy publicity, Stevens narrowly lost his bid for reelection to the Senate. Immediately following the guilty verdict, Stevens' attorneys moved to dismiss the case or, in the alternative, for a new trial. Meanwhile, an FBI agent filed a whistleblower complaint claiming that prosecutors improperly had withheld exculpatory evidence contained in FBI reports contradicting the testimony of the government's star witness, had redacted FBI reports to mirror discovery disclosed to the defense, and had sought to relocate a government witness subpoenaed by the defense. In April 2009, the DOJ moved to set aside the conviction. Upon granting the motion, Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia said: "In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case."

Judge Sullivan then took the extraordinary step of appointing an attorney to investigate whether the prosecution team should be prosecuted for criminal contempt. At the same time, the DOJ began an internal review of its criminal discovery policies, practices, and training.

Justice Department Guidance

On Jan. 4, 2010, Deputy Attorney General David Ogden issued memoranda to all U.S. Attorneys' Offices and other litigating components of the Justice Department that discussed the DOJ's findings from its internal review, established new guidance for prosecutors, and instructed individual offices to develop local discovery policies. Ogden noted that a survey had "demonstrated that incidents of discovery failures are rare in comparison to the number of cases prosecuted." Still, Ogden conceded that "even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system," beyond the consequences in individual cases.

This new DOJ guidance document establishes "a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice." It describes the considerations

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BUSINESS CRIMES HOTLINE

CALIFORNIA

Former Homestore.com CEO Agrees to Plead Guilty to Securities Fraud Conspiracy

On Jan. 7, 2010, the United States Attorney's Office for the Central District of California announced that Stuart Wolff, former chairman of the board and chief executive officer of Homestore.com, had agreed to plead guilty to a single count of conspiracy to commit securities fraud.

The conspiracy charge arose from an alleged scheme to artificially inflate online advertising revenue in 2001 at Homestore.com, the real estate listing company now known as Move, Inc. According to the government, senior executives at the company used multiple "round-trip" transactions to fraudulently generate a circular flow of money. Using the "round-trip" transactions, Homestore.com then recognized its own cash as revenue in an apparent attempt to improve the company's Wall Street profitability assessment. According to the government, the company's shareholders lost at least $100 million upon public disclosure of Homestore.com's accounting irregularities related to the "round-trip" transactions.

For Wolff, the plea signals the end of a legal process that included a prior conviction in 2006 for his role in the scheme. The 2006 conviction was reversed in January 2008 by the Ninth Circuit, on the grounds that the trial judge should have been recused. According to the government, upon entry of Wolff's guilty plea, the Homestore.com investigation has yielded 12 individual federal convictions.

The plea, entered before Judge Gary A. Feess, calls for a minimum sentence of at least three years in prison. The statutory maximum prison sentence for the charge is five years. Sentencing is scheduled for April 19, 2010, in Los Angeles.

DISTRICT OF COLUMBIA

BAE Systems PLC Reaches Combined Settlement with DOJ and UK Serious Fraud Office

On Feb. 5, 2010, BAE Systems PLC, the UK-based defense, security and aerospace company, announced that it had reached a global settlement with the UK's Serious Fraud Office (SFO) and the U.S. Department of Justice (DOJ).

As part of the proposed settlement with the SFO, BAE agreed to pay a £30 million penalty and plead guilty to one charge of breach of duty to keep accounting records. According to the SFO, the plea and penalty are in response to payments made by BAE to a former Tanzania marketing adviser. As part of the plea, the penalty will be split, in an as yet undetermined manner, between a fine and a charitable payment to benefit Tanzania.

While subject to court approval, BAE's proposed DOJ settlement requires the company to plead guilty to a single charge of conspiracy to make false statements to the U.S. Government relating to BAE's regulatory filings and undertakings. As part of the proposed settlement, BAE agreed to pay a $400 million fine and make additional ongoing compliance commitments.

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Business Crimes Hotline was written by **Matthew Alexander**, an associate at Kirkland & Ellis LLP, Washington, DC.

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when their employees are arrested at dawn, often with significant attendant press coverage (as was the case in a number of the arrests described above). Those takedowns may have occurred as the result of aggressive law enforcement techniques, such as wiretaps or undercover agents, allowing the government to obtain "real time" evidence of criminal activity, to which the board or corporate leadership is not privy. The individual defendants are then presented with strong incentives, from both criminal and civil enforcement authorities, to cooperate against their employers. Moreover, the FBI may have executed search warrants (as they did in the January FCPA arrests), which removed evidence from the company's control, preventing its leaders from knowing what evidence is in the government's possession — a stark difference from the circumstances in which all evidence in the government's possession came via the company's cooperation, allowing the corporation to track carefully what the government knows.

Conclusion

Going forward, corporations may find themselves in positions far more similar to those of their individual employees: forced to make informed guesses as to what the government knows and is doing — a far more reactive posture. In this environment, proactive compliance programs become even more critical, as those controls are what give corporate leaders the ability to find any soft spots in their employees' corporate ethics. Additionally, companies now need an enforcement response plan for dealing with unexpected arrests and execution of search warrants. Businesses must expect government agencies to seek large penalties from companies caught flat-footed.

With a good compliance team, companies may still be able to stay in front of government enforcers. But the gap seems to be narrowing.

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Discovery Guidance

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federal prosecutors must take into account during the four-step discovery process: 1) gathering and reviewing discoverable information; 2) conducting the review; 3) making the disclosures; and 4) recording the entire process.

The guidance requires the prosecutor, at the outset of gathering and reviewing discoverable information, to identify the members of the prosecution team. This is not as easy as it sounds because often various federal and state agencies are involved in the investigation or parallel proceedings. To that end, prosecutors are "encouraged to err on the side of inclusiveness" after considering various factors, such as shared resources, degree of participation, the amount of information held by or revealed to the agency, and the degree that the interests in parallel proceedings coincide or diverge.

The prosecutor must then gather and review "all potentially discoverable material within the custody or control" of the identified team members. These materials include the entire investigative agency file, the files of lay witnesses and government agents who might testify, investigation files of parallel proceedings, substantive case-related communications between and among the prosecution team, witness interview notes, and agent notes.

Then, the prosecutor must review the gathered material to determine what information is discoverable. While, ideally, the prosecutor would personally review all of the material, the Department recognizes that "such review is not always feasible or necessary." The prosecutor is permitted to "delegate the process and set forth criteria for identifying potentially discoverable information," but "should not delegate the disclosure determination itself." Thus, the prosecutor is ultimately responsible for the review and cannot blame discovery violations on law enforcement agents or anyone else. Prosecutors are again encouraged to err on the side of inclusiveness at this stage in order "to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence."

Next, the prosecutor must determine what must be disclosed pursuant to the Federal Rules of Criminal Procedure, the Jencks Act, *Brady*, and *Giglio*. After considering various countervailing concerns, the prosecutor is encouraged to provide broader and more comprehensive disclosure than these minimum requirements in order to promote truth seeking and speedy resolution of the case. Nevertheless, the guidance provides a relatively broad list of countervailing concerns: confidentiality and privilege issues, protection of victims and witnesses, privacy interests of witnesses, national security, investigative-agency concerns, and "other strategic considerations that enhance the likelihood of achieving a just result in a particular case."

The DOJ is vague when providing guidance on the timing of disclosures, adopting time frames such as "reasonably promptly after discovery" for exculpatory information and a "reasonable time before trial" for impeachment information. Prosecutors are also left with broad discretion regarding the form of the discoverable information provided to the defense.

Finally, prosecutors are encouraged to keep diligent records of when and how information is disclosed or otherwise made available to the defense. Such records have the potential to reduce discovery disputes both in the current case and in future petitions for post-conviction relief.

Separately, the DOJ addressed local-office discovery policies. Recognizing that "local practices and judicial expectations vary among districts," the Department directed that all U.S. Attorney's Offices and each of the DOJ's other litigating components handling criminal matters develop a discovery policy reflecting circuit and district precedent, rules, and practice. In addition, these offices must appoint a discovery coordinator to provide annual training, serve as on-site discovery advisors, and develop discovery resources and case management programs. To oversee this process, the DOJ created the new office of National Coordinator of Criminal Discovery Initiatives and appointed Andrew Goldsmith, from the DOJ's Environmental Crimes Section, as the first Coordinator.

Conclusion

The DOJ's guidance document and its other measures are important steps to ensure that federal prosecutors are abiding by their discovery obligations and to assure the public that justice is being served. As with most policies, its success will depend upon the compliance of prosecutors and on their supervisors' ability to hold them accountable. Time will tell whether the goal of strict discovery compliance is feasible despite the ever-increasing volume of federal cases.

Although prosecutors retain a high degree of discretion in deciding what, when, and how to disclose discoverable material, Deputy Attorney General Ogden made very clear that they will be held accountable for lapses in discretion. Thus, in close cases, prosecutors may feel more comfortable providing broad discovery beyond the minimum requirements. Such expansive discovery is encouraged by the policy described in the U.S. Attorneys' Manual, as well as Rule 3.8(d) of the ABA's Model Rules for Professional Conduct.

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