

April 2008

## Court Approves Prosecution Where Government Hid Criminal Investigation To Get Evidence From Defendant In Civil Investigation

### *United States v. Stringer*, No. 06-30100 (9th Cir. Apr. 4, 2008)

An SEC investigation is supposedly civil in nature, but a new federal appellate court decision says the government can secretly use an SEC investigation as a *de facto* criminal investigation if the SEC uses no deception and makes no affirmative misrepresentations that an investigation is exclusively civil in nature.

In *United States v. Stringer*, the SEC investigated several defendants for possible civil securities fraud violations. It issued subpoenas to the defendants, and they were deposed. Each subpoena included SEC Form 1662, which states that the SEC “often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors” and advises recipients that they are entitled to exercise their Fifth Amendment rights. As a result of the civil investigation, two of the three defendants entered into a consent decree with the SEC, agreeing to pay penalties, disgorgement, and pre-judgment interest.

One year later, a federal grand jury indicted the three defendants for securities, mail fraud, and wire fraud. Before trial, the U.S. District Court in Oregon dismissed the indictment on the ground that the government’s “trickery and deceit” violated due process. Alternatively, the District Court suppressed the evidence obtained through the SEC subpoenas as fruits of an illegal search. The United States appealed.

Throughout its civil investigation, the SEC had been secretly assisting the Oregon U.S. Attorney in a parallel criminal investigation. The SEC granted the U.S. Attorney access to all of its non-public investigative files, and it interviewed the defendants with an eye toward creating “the best record possible” to support “false statement cases” against them. The SEC deposed defendants in Oregon so that the Portland U.S. Attorney’s office would have venue over any false statements case. And the agency took steps to ensure that the defendants did not find out about the U.S. Attorney’s investigation. When one defendant’s attorney asked an SEC attorney whether the SEC was working in conjunction with a U.S. Attorney’s office, the SEC attorney referred him to the “routine uses” section of SEC Form 1662 and suggested that he contact U.S. Attorney’s offices with his inquiry.

For its part, the U.S. Attorney chose not to “surface” the criminal investigation during the civil investigation because, among other reasons, the U.S. Attorney did not want to jeopardize a meeting between the SEC and the defendants.

In response to the United States’ appeal, the Ninth Circuit Court of Appeals vacated the District Court’s dismissal and suppression of evidence. In so doing, the Court of Appeals held that there was no due process violation because the government did not make affirmative misrepresentations about the nature of the investigation or engage in deceit. Rather, the government simply chose not to conduct an open criminal investigation. The government disclosed to the defendants that the information gathered in the civil investigation could be used for criminal proceedings. The Ninth Circuit’s decision cleared the way for the criminal case against all three defendants to return to the District Court for trial or guilty pleas.

The bottom line: you can never assume that an SEC or other agency civil investigation is merely a civil nature. You must assume that the investigation is also a criminal investigation. Remember, any information you provide can be used against you criminally, even after the civil case is over. The SEC and other agencies will take direction from the U.S. Attorney on how the agency can best gather evidence that can be used to prosecute you and how best to conceal the existence of a secret criminal investigation without making affirmative misrepresentations. Once the U.S. Attorney has reason to believe that you have committed a crime, his goal is to investigate you covertly and to have you cooperate and produce statements and other evidence to the agency in the civil investigation that he can use to prosecute you.

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