

White Collar Criminal Defense, Regulatory Compliance and Special Investigations Update

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***Salinas v. Texas*: How the Supreme Court's Decision in a Murder Case Impacts the Issue of "Remaining Silent" in Corporate White Collar Investigations**

The Supreme Court recently issued an opinion in a Texas murder case that has broad implications for any corporate representative or employee who seeks to invoke his or her Fifth Amendment Right against self-incrimination in the course of a government investigation.

In the *Salinas v. Texas* case, defendant Genovevo Salinas had voluntarily accompanied police officers to the police station to answer questions about a double homicide. Since he was not under arrest and free to leave at any point, Salinas was not issued a Miranda warning. Salinas voluntarily answered some of the officer's questions, but when asked whether shotgun casings found at the scene belonged to his gun, Salinas said nothing and, according to the police testimony at trial, shifted nervously in his seat. At his subsequent trial, prosecutors used the fact that Salinas had stood silent and since he did not answer that question it was evidence of his guilt. Salinas' attorney argued that such evidence was inadmissible because Salinas's silence and refusal to answer the questions was, effectively, an invocation of his Fifth Amendment privilege. The trial court disagreed and Salinas was subsequently convicted and sentenced to 20 years in prison.

Two Texas appellate courts agreed with the trial judge and affirmed the conviction and sentence. The Supreme Court agreed to take the case. The petition for certiorari by Salinas' attorneys was granted and, as the Supreme Court noted at the outset of the *Salinas* opinion, the petition was granted "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief."

However, in a surprising twist, the Supreme Court never reached that issue. Instead, in a splintered opinion, a plurality of the Court held that the defendant's silence and refusal to answer the question was not an action sufficient to invoke his Fifth Amendment rights. Specifically, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, said that silence was not an invocation of the Fifth Amendment. Justice Thomas, in a separate opinion joined by Justice Scalia, would have answered the constitutional question upon which the Court had agreed to hear in this case, and held that the prosecutors could have used the suspect's silence against him at the trial, even if he had specifically claimed a Fifth Amendment right (essentially, holding that there is no Fifth Amendment protection in a non-custodial and voluntary interview with law

enforcement). In the dissenting opinion, Justice Breyer, joined by Justices Sotomayor, Kagan and Ginsburg, wrote that courts should examine the specific circumstances surrounding an individual's encounter with police to decide whether the person's silence was, in fact, an attempt to invoke their Fifth Amendment privilege. Noting in this case that the questioning was in the context of a criminal investigation, the police made clear to Salinas that he was a suspect, his interrogation took place at a police station and he was not represented by counsel, the dissenters would deem his silence an invocation of his Fifth Amendment right.

The case has important implications for companies and their employees who are ensnared in a government investigation. Most government investigations in the white collar arena have a lengthy pre-charging stage, where the case is under investigation and the government is attempting to amass enough evidence to bring charges. Part of that investigation is conducted covertly (i.e., subpoenaing bank records, reviewing tax returns, interviewing people hostile to the company, and/or using wiretaps or an informant to gather information); and part of the investigation (the latter end of it) is conducted overtly, where, for example, the government will conduct dawn raids on the company through the execution of a search warrant and/or attempt to interview current employees. Indeed, the government will try to conduct these interviews at the employee's home after the workday or during the execution of the search warrant to catch the employee "off guard." Those interviews are considered voluntary since the person is not in custody.

Based on the opinion in *Salinas*, if an employee voluntarily submits to such questioning and is asked a question he/she does not want to answer on the grounds that the answer may be incriminating, the employee needs to expressly invoke his/her Fifth Amendment privilege. Staying silent and refusing to answer a question is not enough, and without the protections from a proper invocation of Fifth Amendment rights, the silence may be used against that person in a subsequent prosecution as evidence of guilt.

Accordingly, companies, at a minimum, should be sure that their training manuals and their internal policies make clear that while an employee is free to speak to law enforcement agents, they: a) have a right to have an attorney present and can postpone the interview to allow them to obtain an attorney, and (as a result of *Salinas*), b) they must expressly invoke their Fifth Amendment privilege if they choose not to answer a question that would provide information that could be personally incriminating.

**For more information, please contact the White Collar Criminal Defense,
Regulatory Compliance and Special Investigations Practice Group at
Lane Powell: whitecollar@lanepowell.com**

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