WHITE COLLAR CRIME & INVESTIGATIONS

LAW UPDATE

RuskinMoscouFaltischek P.C.
Smart Counsel. Straight Talk.

Ruskin Moscou Faltischek's White Collar Crime & Investigations Legal Capabilities:

- Mortgage fraud
- Bribery and political corruption allegations
- Internet/computer crimes
- Healthcare fraud
- Federal RICO violations
- Medicare and Medicaid fraud
- Mail and wire fraud
- Money laundering
- State Enterprise Corruption cases
- Pollution and other environmental crimes
- Anti-kickback allegations
- Financial institution, insurance fraud and embezzlement
- Securities and other financial frauds
- Insider trading
- U.S. Customs violations

For additional information on this or any white collar criminal law related issue, please contact RMF's White Collar Crime & Investigations co-chairs: Alexander G. Bateman, who can be reached at 516-663-6589 or abateman@rmfpc.com or Gregory J. Naclerio, who can be reached at 516-663-6633 or gnaclerio@rmfpc.com

April 2011

SKILLING AND HONEST SERVICES FALLOUT

Federal prosecutors announced on January 13, 2011 that they would not seek to retry convicted media mogul Conrad Black on fraud charges. This decision is the latest chapter in high-profile prosecutions that have been affected by the Supreme Court's June 24, 2010 decision to strike down a portion of the honest services fraud statute.

Prosecutors may no longer use the honest services fraud statute as a broad brush to paint actions that do not fit into a larceny story as criminal. The Supreme Court halted this practice on June 24th of last year, when it struck the honest services fraud statute (18 U.S.C. § 1346) with an impact that still reverberates from corporate boardrooms to the halls of Congress. In *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896 (2010), the Court effectively removed an entire category of crimes, those involving undisclosed self-dealing, from Section 1346's definition of "honest services." 18 U.S.C. § 1346 defines a "Scheme or Artifice to Defraud" under the mail fraud statute as "a scheme or artifice to deprive another of the intangible right of honest services."

Skilling's sweeping ruling has had a "real" impact on pending honest services fraud investigations, according to Assistant Attorney General Lanny Breuer in his September 28, 2010 testimony before the Senate Judiciary Committee. The impact he cites means that prosecutors will need to limit current investigations under the honest services statute to those involving bribery or kickbacks, rather than undisclosed potential conflicts of interest. Past investigations into bribery or kickbacks frequently ended with charges of violating the honest services fraud statute when prosecutors could only discover evidence of undisclosed conflicts of interest rather than overt fraud or kickbacks. Defendants have complained for years that the honest services fraud statute as applied was unconstitutionally vague.

In addition to Mr. Breuer, the United States Attorney for the Northern District of New York, Richard S. Hartunian, acknowledged the destructive impact of the *Skilling* case on honest services fraud prosecutions. Mr. Hartunian's office convicted former New York State Senate Majority Leader Joseph Bruno of honest services fraud last year. That conviction is currently on appeal. A post-*Skilling* letter from Mr. Hartunian to defense counsel in that case asserts that the prosecution presented enough evidence at trial to convict Mr. Bruno for honest services fraud, even under the *Skilling* ruling, but it also concedes that the jury instructions would not pass the *Skilling* muster. Mr. Hartnunian offered to grant Mr. Bruno a new trial if his attorneys will acknowledge that the prosecution is entitled to prosecute Mr. Bruno again. Such a hat-in-the-hand approach signals that the government has real concerns that the Second Circuit will throw out Mr. Bruno's conviction altogether.

While the future of the Bruno case is unresolved, Mr. Breuer suggested before the Senate that it plug the hole in the honest services fraud statute to allow prosecution of public officials by drawing from other clearly established statutes. He pointed to 18 U.S.C. § 208 as a good source from which to target public officials. Section 208 clearly illustrates conflicts of interest that are currently prohibited in the federal Executive Branch. In order to avoid prosecuting individuals for honest mistakes, Mr. Breuer recommends that only knowing or intentional conflict concealments give rise to criminality.

Creating legislation targeting honest services fraud for private officials is exponentially more difficult, and Mr. Breuer merely suggests to the Senate Judiciary Committee that he looks forward to working together to craft an appropriate solution.

Senator Patrick Leahy has introduced a bill, "The Honest Services Restoration Act," which proposes to add §1346A to the mail fraud statute. This new section specifically proscribes undisclosed self-dealing for both public and private officials. However, the proposed statute only addresses officers and directors of publicly traded companies and public charities, so private individuals will remain difficult targets for prosecution.

NEW WHISTLEBLOWER PROVISIONS

The U.S. Securities and Exchange Commission ("SEC") issued proposed rules on November 3, 2010 that allow whistleblowers to receive substantial rewards for reporting federal securities laws violations. As of January 18, 2011, the SEC has received over 1,000 written comments from both ordinary citizens and major corporations, and SEC officials have hosted over a dozen meetings with concerned parties to discuss the proposed rules. The rewards provide a whistleblower with the ability to recover up to 30 percent of any monetary recovery by the SEC or other enforcement agency, exceeding one million dollars.

The Rules are contained in the SEC's proposed Regulation 21F, which the SEC issued pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The Dodd-Frank Act allows the SEC to reward whistleblowers who report securities laws violations. Consider that if someone had alerted the SEC to the activities featured in the recent enforcement action brought against Goldman Sachs, a whistleblower could have collected $55 million to $165 million based on the settlement.

Corporations are concerned that Regulation 21F will discourage internal corporate compliance efforts if whistleblowers are blinded by dreams of "winning the lottery." Former SEC Chairman Harvey L. Pitt has said, "Compliance departments will now be competing with the SEC for who gets the tip first." Under the proposed rules, the SEC attempts to minimize this effect by first exempting wrongdoers and those tasked internally with corporate compliance responsibilities from recovering monetary awards, and second by granting a grace period for reporting directly to the SEC. Under the grace period, a whistleblower will still recover an award if she first submits information to an internal corporate compliance entity. Then, if the whistleblower reports the same information to the SEC within 90 days of the original disclosure, that whistleblower will receive credit for the disclosure dating back to the original internal report.

Because the dollar value of recent settlements have been so high, many companies are doubly concerned that the proposed rules will increase the number of Foreign Corrupt Practices Act ("FCPA") claims. This potential is significant when one considers that Dodd-Frank has expanded disclosure requirements for "resource extraction issuers," who are often publicly traded mining and energy companies. Under the expanded disclosure requirements, those companies are required to file statements with the SEC disclosing payments made to the U.S. and foreign governments. Companies already spending money to comply with the FCPA by rooting out illegal government payments will have to expand their own compliance efforts since Dodd-Frank now requires them to disclose legal government payments as well. Inevitably, mistakes will occur as companies expand their FCPA compliance efforts, and the large potential rewards will encourage whistleblowers to come forward and report them.

In this era of new scrutiny, companies must be vigilant in their compliance efforts, which include responding quickly and effectively to internal complaints as well as regulatory inquiries. Competent counsel should be sought as early as possible to serve as a guide through this increasingly complex maze.

Attorney Advertising

MISS AN ISSUE?
You can access past RMF Alerts whenever you like.
View Archives