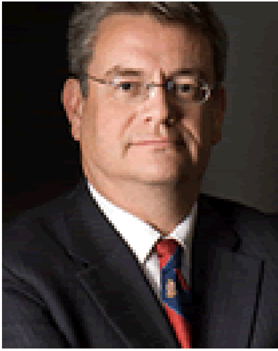

Break-Out Session - Track C: White Collar Crime

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SELECTED WHITE-COLLAR CRIME ISSUES:

INSIDER TRADING

A. Lessons from Rajaratnam Conviction and Appeal

1. The rise of street-crime investigatory techniques in "suite-crime" cases
2. Implications for corporations, officers and employees

B. SEC Policy and Judicial Scrutiny of Settlements

1. Admissions Required? On June 18, the SEC announced that it would not necessarily allow defendants to settle SEC cases without admitting or denying the allegations.
2. Further, in some cases, it said that it would demand admissions as part of the settlement.
   a. Cases of "egregious intentional misconduct"
   b. Cases where the conduct harmed many investors
   c. Obstruction cases
3. Judicial Skepticism. Federal district judges have expressed skepticism about the SEC's settlement approach.
   a. The must-read opinion: United States v. Orthofu:, Inc. and United States v. APTx Vehicle Systems Limited, Nos. 12-10169-WG Y and 12-10374-WGY (D.Mass. July 26, 2013) (Judge William G. Young)
      1) Two cases where defendants had reached agreements under Federal Rule of Criminal Procedure I I(c)(I)(C) (so-called "C" pleas)
      2) Sidebar: How do "C pleas" differ from other pleas?
   b. "[I]t would be rare indeed for a corporate criminal to persuade this Court that its guilty plea is an appropriate
   candidate for acceptance under the fetters of Rule I I(c)(I)(C)." Why?
      1) Rejection of plea-as-contract theory
      2) Satisfaction of the "public interest" (as opposed to the parochial interests of the defendant and the agency): "[I]t is precisely because the parties are inclined to regard themselves as dealmakers, each zealously securing their own several interests, that the court has to guard vigilantly the interests of the public." (Slip Op. at 27)
      3) Corporate criminals "raise heightened considerations of the public interest." (Slip Op. at 29)

4. Other cases of note:
   a. Judge Jed Rakoff rejected the SEC's $285 million settlement with Citigroup: "Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court too become its partner in enforcement [without knowledge of the facts] .. . , the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance." SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d. 328, 332 (S.D.N.Y. 2011) (Rakoff, J.).
   b. The court appeals stayed the case. SEC v. Citigroup Global Mkts., Inc., 673 F.3d 158 (2d Cir. 2012), noting that "[i]t is not .. . the proper function of federal courts to dictate policy to executive administrative agencies." Id. at 163. The Second Circuit heard arguments in February.
   c. SEC v. CR Intrinsic Investors, LLC, No. 12 Civ. 8466 (VM), 2013 WL 1614999, at *4 (S.D.N.Y. April 16, 2013) (Marrero, J.) (provisionally approving SEC settlement, conditioning approval on the outcome of the Citigroup appeal.
   d. SEC v. Bridge Premium Fin., No. 12-cv-

02131-JLK-BNB (D. Colo. 2013) (Kane, J.) (rejecting the SEC's settlements with alleged managers of a Ponzi scheme: "A defendant's options in this regard are binary: He may admit the allegation or he may go to trial.")

e. SEC v. Int 'l Bus. Machs. Corp., No. I I-cv-00563-RJL (D.D.C. Dec. 20, 2012) (Leon, J.) ("This is not a rubber stamp court ... I don't just sign it and turn it over.")

f. See generally cases cited in Orthofu: at note 20.

5. Implications?

a. Collateral consequences in civil lawsuits, private actions and state regulatory proceedings.

b. Possible increase in trials.

c. More administrative actions (for example, cease-anddesist).

CRIMINAL AND CIVIL FORFEITURE

A. In re Rothstein, Rosenfeldt, Adler PA (United States v. Rothstein), 717 F.3d 1205 (I Ith Cir. 2013).

Facts: lawyer commingles proceeds from Ponzi scheme with lawful proceeds in law firms accounts.

Issue: Can the government seize the accounts?

Ruling: Where proceeds of Ponzi scheme were commingled with law firm's legitimate income in bank account in name of law firm, Government precluded as a matter of law from seizing (i) law firm bank accounts under RICO forfeiture statute as "proceeds" of individual criminal defendant's Ponzi scheme, and (ii) property, to the extent it was acquired with funds from law firm bank accounts. Government not precluded from seizing individual defendant's interest in law firm assets.

B. Implications and practice points?

C. United States v. Bonventre (2d Cir. 2013)

Facts: Bonventre was charged with various securities and tax crimes related to the massive Madoff fraud. The indictment contained broad forfeiture allegations and specifically identified as forfeitable real and personal property in which Bonventre had ownership interests. He was also subject to a parallel civil forfeiture action.

Issue: In United States v. Monsanto, 924 F .2d 1186 (2d Cir.1991) (en bane), the Second Circuit held that where a criminal defendant seeks to use restrained funds to hire counsel of choice, the Fifth and Sixth Amendments entitle the defendant to an adversarial, pre-trial hearing at which the court evaluates whether there is probable cause to believe (1) that the defendant committed the crimes that provide the basis for the forfeiture; and (2) that the contested funds are properly forfeitable.

Must a defendant seeking a Monsanto hearing first make a threshold showing that such a hearing is warranted, and if so, what the standard for such a showing should be?

Ruling: A defendant seeking a Monsanto hearing must demonstrate, beyond the bare recitation of the claim, that he or she has insufficient alternative assets to fund counsel of choice.

D. Implications and practice points?

SALINAS AND THE FIFTH AMENDMENT IN FINANCIAL-SERVICES CASES

A. How does a Texas murder case apply to financial-services investigations?

Facts: two homicides. Police recover shotgun shell casings at the scene. Agents call on Mr. Salinas, who voluntarily agrees to go to the police station. Police question him for about for an hour. (No Miranda warnings: he was free to leave, which rendered the interrogation "noncustodial," so Miranda is not implicated.) Salinas talks until he is asked whether the casings from the scene would match his shotgun. He says nothing, looks down, shuffles his feet, bites his lip and generally acts uncomfortable. More silence. Officers then ask more questions, which Salinas answers. At trial, the government highlights Salinas' s silence, arguing that if he were innocent, he would have answered the question.

Issue [supposedly]: Can the government use at trial evidence that a defendant, in a non-custodial interview, claimed his or her Fifth Amendment rights?

Ruling: The Supreme Court never reached the issue. Rather, it held that Salinas never invoked his Fifth Amendment rights. People can be silent for lots of reasons. He never said "Fifth Amendment" or "silence" or "lawyer" or anything else that objectively indicates an invocation of the constitutional privilege.

B. What are the implications for companies and individuals in jinancialservices and other white-collar investigations?

1. Salinas applies to all non-custodial witness interviews by government agents.

2. Interviews by agents are carefully-planned.

3. Men In Black and Actual FBI Training Tips on Interview Techniques [attached].

4. If an officer or employee starts to talk, and then stops, the government at trial will probably be able to comment on the silence.

CONCLUSION

THE FBI: MOVIES AND REAL LIFE

Beatrice: You here to make fun of me too?

Kay: No, ma'am. We at the FBI do not have a sense of humor we're aware of. May we come in?

Beatrice: Sure.

--- from Men In Black (1997)

Ten Techniques for Building Rapport

1) Establish artificial time constraints. Allow the potential source to feel that there is an end in sight.

2) Remember nonverbals. Ensure that both your body language and voice are nonthreatening.

3) Speak slower. Do not oversell and talk too fast You lose credibility quickly and appear too strong and threatening.

4) Have a sympathy or assistance theme. Human beings want to provide assistance and help. It also appeals to their ego that they may know more than you.

5) Suspend your ego. Tlus probably represents the hardest technique but without a doubt, is the most effective. Do not build yourself up-build someone else up, and you will have strong rapport.

6) Validate others. Human beings crave feeling connected and accepted. Validation feeds this need, and few offer it. Be the great validator and have instant, valuable rapport.

7) Ask "how, when, and why" questions. 'When you want to dig deep and make a connection, asking these questions serves as the safest, most effective way. People will tell you what they are willing to talk about.

8) Connect using quid pro quo. Some people are more guarded than others. Allow them to feel comfortable by shanng a httle about yourself if needed. Do not overdo it.

9) Give gifts (reciprocal altruism). Human beings reciprocate gifts given.Give a gift, either intangible or material, and seek a conversation and rapport in return.

10) Manage expectations. A void feeling and embodying disappointment by ensurmg that your methods focus on benefiting the targeted individual, not you. Ultimately, you will win, but your mind-set needs to focus on the other
person.

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About Jack Sharman

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"Draw your chair up close to the edge of the precipice and I'll tell you a story." — F. Scott Fitzgerald

The place where your business or your life meets the legal system is a cliff. To not fall off the cliff requires two things. Trust. And, someone to tell your story. Trust between lawyer and client. And a narrative that persuades, whatever the audience—judge or jury, prosecutor or regulator, adversary or ally.

I base my practice first on trust, then on persuasion. Trust gets you to a comfort level; persuasion allows us to solve problems by shaping someone else's thinking. From white-collar criminal prosecutions to toxic torts, from D&O lawsuits to professional liability claims, from electronic-discovery advice to alternative-fee arrangements—all of which I do—none of it matters unless there is trust and a narrative.

So, when do I most like to work? When they blame management. In the current economic and political climate, directors, officers and professionals—accountants, investment bankers, business consultants and lawyers—are ripe targets for blame. I've handled most types of directors' and officers' and professional liability litigation—fiduciary duty lawsuits, malpractice claims and contract disputes, claims for securities fraud and tortious interference with contractual and business relations, and recovery actions brought by trustees of bankrupt publicly-traded companies.

When they try to put you in prison and your business out of business. On the white-collar side, I have pretrial, trial and appellate experience across the federal and state landscape: corporate internal investigations, kickback cases, grand jury investigations, gaming issues, defense of criminal environmental offenses, public-corruption enforcement, due diligence issues under the Foreign Corrupt Practices Act, Congressional investigations, election contests, defense of health-care entities in civil and criminal matters, including Medicare fraud and qui tam lawsuits under the False Claims Act, and investigations by military officials. I'm also the publisher of the firm's Twitter feed about white-collar crime and enforcement matters: @WhiteCollarWire.

When technology meets law, and it's not going well. As a lawyer in the firm's Electronic Discovery and Digital Information practice, I represent companies and individuals in a host of electronic-information issues pre-trial, at trial and on appeal.

When they claim you're harming the environment. In the environmental and toxic-tort area, I've represented a variety of industries and businesses for more than two decades in state and federal courts in Mississippi, Alabama, Florida, Pennsylvania, New York and the District of Columbia. I've defended personal injury and property damage claims involving facilities in the chemical, petrochemical, nuclear, wood-treatment and pulp-and-paper industries. I've served as counsel to plaintiffs and defendants in private, governmental and citizen suits under CERCLA, RCRA and other federal and state statutes, natural-gas disputes and in Superfund and RCRA negotiations and remediations.

Education

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