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When the Government Comes Calling on Your Civil Client

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When the Government Comes Calling on Your Civil Client

I. INTRODUCTION

When the government comes calling on your civil client, it may have intentions to pursue criminal violations, or may have already done a referral to the United States Attorney's Office. It may be FINRA or the CFTC calling, but the SEC and DOJ may be lurking in the background. If your client does not cooperate, he may lose his license. If he does, he may lose his liberty. It may be the FDA that first shows up to investigate possible contamination of a product your client is shipping, but it will be the DOJ offering a settlement of a million dollar fine for the company with the enticement that the principal will not be charged. And it will be DOJ that ultimately prosecutes the FDA violations and adds wire fraud and money laundering simply because your client sent his client an invoice for the product. This can happen, and has happened. Do you advise your client to cooperate or to assert his Fifth Amendment rights? Cooperating with the government has risks, but so does not cooperating. If you and or your client conducted an internal investigation, do you notify the government of what you found in the investigation? Those are some of the issues that need to be considered when the Government shows up.

II. THE MAIL AND WIRE FRAUD STATUTES

A. The Broad Scope of the Mail and Wire Fraud Statutes

In addition to criminal statutes governing specific subjects such as securities, food and drugs, and pollution, the mail and wire fraud statutes are often in play. Judge Ralph Winter has aptly described those statutes as "[f]oremost among" "the statutory weapons available to prosecutors" that "rank by analogy with hydrogen bombs on stealth aircraft."[1] Others have observed that "Federal prosecutors have long followed the maxim, 'When in doubt, charge mail fraud.'"[2]

The mail fraud statute was originally enacted in 1872 as part of a recodification of the postal laws, but along with the wire fraud statute, which was added in 1952, it has become an all-purpose tool to prosecute alleged fraud, since all but the simplest endeavors generally involve some use of the mails, the wires, radio, television, or a private or commercial interstate carrier (as amended, the statutes reach any of those modes of communication). As they have been interpreted, the statutes are especially broad for two reasons. First, the item mailed, for example, need not itself be deceptive in any way. It is sufficient that the mailing was part of the execution of the scheme or facilitated concealment of the scheme. *See Schmuck v. United States*, 489 U.S. 705, 715 (1989); *United States v. Lane*, 474 U.S. 438, 453 (1986). Second, traditionally courts "defined

[1] Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L. J. 945, 954 (1993).

[2] John C. Coffee & Charles V. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES, § 9.01, at 9-2 (O. Obermaier & R. Morvillo eds., 1990).

['scheme to defraud'] broadly, allowing it to encompass deceptive schemes that do not fit the common-law definition of fraud." *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002). Although in 1999 the Supreme Court changed course and concluded that the mail and wire fraud statutes presumptively incorporate the common law meaning of fraud,[3] thus far that conclusion has been implemented only to a limited extent.

The government liberally uses these statutes and routinely includes multiple counts since each use of the mails or wires is a separate offense. No independent statute needs to be used alongside the mail or wire fraud counts. They can stand alone.

B. The Government's Response to *Skilling*

In some instances, however, the government has not been able to charge mail and wire fraud in recent years as reflexively as it did in the past. The Supreme Court held in *Skilling v. United States*, 561 U.S. 358 (2010), that the "honest services" statute, 18 U.S.C. § 1346, "criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 409 (emphasis in original).[4] Although *Skilling* and *McDonnell v. United States*, 136 S. Ct. 2355 (2016), have had their most-publicized effects in political corruption cases, such as the prosecutions in New York of powerful state legislators Sheldon Silver and Dean Skelos,[5] *Skilling* has also had a broader impact.

For example, before *Skilling*, corporate directors, officers, employees, and agents who had allegedly concealed a conflict of interest could be prosecuted for mail or wire fraud on the ground that they entered into schemes to deprive corporations or shareholders of the right to "honest services." *See, e.g.*, *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (wire fraud charges against head of the Oklahoma City Municipal Bond Underwriting Department of Stifel, Nicolaus & Company for receiving compensation from both issuers and third-party financial institutions in connection with his underwriting of several municipal bond issues); *United States v. Brennan*, 938

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[3] *Neder v. United States*, 527 U.S. 1, 23 n.7 (1999).

[4] In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court rejected the "intangible rights" doctrine, under which the courts of appeals had construed the mail and wire fraud statutes to prohibit not schemes aimed at causes deprivations of money or property, but also schemes implicating various "intangible rights," such as "the right to conscientious, loyal, faithful, disinterested and honest government," *United States v. Mandel*, 591 F.2d 1347, 1359 (4th Cir.), *on rehearing en banc*, 602 F.2d 653 (4th Cir. 1979), an employer's right to the honest services of his employee, *see United States v. Von Barta*, 635 F.2d 999, 1005–07 (2d Cir. 1980), and an electoral body's "political rights to fair elections." *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984). Section 1346, enacted a year after *McNally*, restored "only the intangible right of honest services." *Cleveland v. United States*, 531 U.S. 12, 20 (2000).

[5] *United States v. Skelos*, 2017 WL 4250021 (2d Cir. Sept. 26, 2017) (reversing conviction for conspiracy to commit wire fraud because jury instructions were erroneous); *United States v. Silver*, 864 F.3d 102 (2d Cir.) (reversing conviction for mail and wire fraud because jury instructions were erroneous), *petition for cert. filed*, 86 U.S.L.W. 3203 (U.S. Oct. 11, 2017) (No. 17-562).

F. Supp. 1111 (E.D.N.Y. 1996) (mail fraud charges against former President, Chairman, and CEO of insurance underwriting company for failure to disclose conflict of interest), *rev'd*, 183 F.3d 139 (2d Cir. 1999). *Skilling* essentially ends such use of the "honest services" statute, except in the rare case involving a bribe or kickback.

Because *Skilling* makes the "honest services" statute less potent, it has become more important for prosecutors to rely upon expansive interpretations of the mail and wire fraud statutes themselves, in particular, the language "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §§ 1341, 1343. Despite the presence of the word "or," it is settled that each statute defines only a single offense.[6] Where the "honest services" theory is unavailable, the government must prove the existence of a scheme aimed at depriving some person or entity of money or property.

What if there was deception and money changed hands, but no tangible loss occurred or was contemplated? For example, the deception may involve a profit secretly being made by the provider of goods or services, where the party receiving the services nevertheless received what it bargained for at the price it was willing to pay. Or the deception may involve compliance with government requirements concerning the participation of minority-owned businesses. Defense attorneys have fought with prosecutors for years over whether there can be liability for mail and wire fraud in such circumstances. *Compare, e.g.*, *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009) (finding liability); *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006) (same); and *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (same), *with United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994) (finding no liability); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511 (7th Cir. 1993) (same); *United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992) (same); *United States v. Bruchausen*, 977 F.2d 464 (9th Cir. 1992) (same); *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988) (same); *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987) (same).

In her decision last Summer in *United States v. Davis*, 2017 WL 3328240 (S.D.N.Y. Aug. 3, 2017), Judge Loretta Preska dealt with the "right to control" theory, which has been recognized in the Second Circuit and has been the basis for liability in some situations not involving actual or threatened monetary loss. In a 2015 decision, the Second Circuit offered this formulation of the theory:

> The "right to control one's assets" does not render every transaction induced by deceit actionable under the mail and wire fraud statutes. Rather, the deceit must deprive the victim "of potentially valuable economic information." "Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes."

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[6] *See Cleveland*, 531 U.S. at 26 ("In *McNally*, we . . . conclud[ed] that the second phrase simply modifies the first by 'ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.' . . . We reaffirm our reading of § 1341 in *McNally*.").

> Thus, we have repeatedly rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain. But we have upheld convictions for mail and wire fraud where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement. The requisite harm is also shown where defendants' misrepresentations pertained to the quality of services bargained for . . . . Lastly, we have repeatedly upheld convictions where defendants' misrepresentations in a loan or insurance application or claim exposed the lender or insurer to unexpected economic risk. *United States v. Binday*, 804 F.3d 558, 570–71 (2d Cir. 2015) (citations omitted).

Davis involved structural steel work on Tower 1 of the new World Trade Center and on the World Trade Center PATH Transportation Hub. The defendants, who had been awarded a contract by the Port Authority, were charged with misrepresenting to the Port Authority that two minority-owned businesses would be doing work under the contract, when in reality they were pass-through entities for non-minority companies. Judge Preska granted the defendants' motion for judgment of acquittal, determining that the evidence did not satisfy the Second Circuit test for liability pursuant to the "right to control" theory.

Another developing line of cases causing difficulty for prosecutors as to some mail and wire fraud charges began with the Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), which for the first time embraced "the presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the mail fraud, wire fraud, and bank fraud statutes." *Id.* at 23 n.7. The Court also stressed that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable 'fraud' had a well-settled meaning at common law." *Id.* at 22.

Neder's narrow holding was that materiality is an element of mail, wire, and bank fraud. Unfortunately, jury instructions often contain tests of materiality that make it difficult for the defense to succeed on this issue. *See, e.g.*, *United States v. Raza*, 2017 U.S. App. LEXIS 23431, at *42 (4th Cir. Nov. 20, 2017) ("[T] the district court did not err in failing to require the misrepresentations in the SunTrust loan applications to be material to SunTrust as the fraud victim. . . . [T]he correct test for materiality . . . is an objective one, which measures a misrepresentation's capacity to influence an objective 'reasonable lender,' not a renegade lender with a demonstrated habit of disregarding materially false information.").

But *Neder*'s significance has not been limited to the issue of materiality. Relying on *Neder*, the Eighth Circuit held in 2012 that passive concealment—mere nondisclosure or silence—cannot support a mail or wire fraud charge. *United States v. Steffen*, 687 F.3d 1104, 1115–16 (8th Cir. 2012). Under *Steffen*, which finds support in a 2000 decision by the Fourth Circuit under the bank fraud statute,[7] to prove mail or wire fraud the government must prove either active concealment or some kind of false or misleading statement (although an implied misstatement may suffice).

On the hand, the Ninth Circuit in *United States v. Woods*, 335 F.3d 993 (9th Cir. 2003), rejected the defendants' argument that the government was required to prove a specific false

[7] *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000).

statement. The defendants in *Woods* argued that since the Supreme Court in *Neder* considered the materiality of an alleged falsehood to be an element of a charge of mail or wire fraud, then it follows that such a charge requires a definite, actual specific false statement or specific omission. The Ninth Circuit disagreed, stating that *Neder* addressed only the materiality of misrepresentations, not the specificity. *Woods*, 335 F.3d at 999.

Justice Gorsuch, who joined the Supreme Court last Spring, may well share the distaste for broad constructions of federal criminal statutes of the Justice he replaced, Antonin Scalia. But as far as the mail and wire fraud statutes are concerned, the substitution of Justice Gorsuch for Justice Scalia is more likely to help the government than hurt it. During a tenure on the high court of nearly three decades, Justice Scalia voted against the government in every divided merits decision involving interpretation of the mail fraud statute or the wire fraud statute.[8] It was only after Chief Justice Burger retired and Justice Scalia joined the Court in 1986 that it granted certiorari in *McNally* in order to consider the "intangible rights" doctrine,[9] which it then rejected. In *Skilling*, he would have gone further than the majority and would have held the "honest services" statute flatly unconstitutional, rather than reading it narrowly.

III. SECTION 1001 AND OTHER FALSE STATEMENT STATUTES

In part because of courts' growing sensitivity to the potential unfairness of mail and wire fraud charges, recently the government has made increased use of 18 U.S.C. § 1001 and other false statement statutes. Section 1001 applies not only to statements to federal agencies but also to many statements to state and local agencies[10] and even private parties.[11] The government's burden of proof when it tries a defendant on a false statement charge can be remarkably light. Whereas Justice Scalia fought to narrow the mail and wire fraud statutes, he also wrote a 1998 opinion that overturned the "exculpatory no" doctrine, which many circuits had used to limit Section 1001.[12] Professor Stephen Saltzburg has said of Section 1001, "[t]here is no statute out there that's more

[8] *Skilling v. United States*, 561 U.S. 358 (2010); *Pasquantino v. United States*, 544 U.S. 349 (2005); *Schmuck v. United States*, 489 U.S. 705 (1989); *McNally v. United States*, 483 U.S. 350 (1987).

[9] 479 U.S. 1005 (1986).

[10] *See, e.g., United States v. King*, 660 F.3d 1071 (9th Cir. 2011) (a farmer's statement about an irrigation well to an investigator for a state agriculture department).

[11] *See, e.g., United States v. Gibson*, 881 F.2d 318, 320, 322–23 (6th Cir. 1989); *United States v. Uni Oil*, 646 F.2d 946, 954–55 (5th Cir. 1981); *United States v. Cartwright*, 632 F.2d 1290, 1291–93 (5th Cir. 1980); *United States v. Kirby*, 587 F.2d 876, 881 (7th Cir. 1978).

[12] *Brogan v. United States*, 522 U.S. 398 (1998).

pernicious."[13] Judge Brett Kavanaugh of the D.C. Circuit has aptly described the statute as "ever-metastasizing" and warned that "§ 1001 prosecutions can pose a risk of abuse and injustice."[14]

In securities cases, for example, false statement charges can be critically important. When Martha Stewart was prosecuted after she traded in the stock of ImClone Systems ahead of a public announcement that its key pharmaceutical product would not receive FDA approval, she successfully moved for a judgment of acquittal on a charge of securities fraud. But she was convicted of violating Section 1001.[15]

This past October, the Supreme Court's denial of certiorari marked the end of the prosecution of Donald Blankenship, the former chairman and CEO of Massey Energy Co., who had been charged after an explosion at a mine in West Virginia killed 29 miners. Blankenship spent a year in prison for conspiring to violate mine safety laws. He also faced two false statement charges, one under Section 1001 and one under a provision of the securities laws, 17 U.S.C. § 78ff, and Rule 10b-5. Both charges focused on statements in a memo to shareholders included in an SEC filing. The statements said that "[w]e do not condone any violation of [Mine Safety and Health Act] regulations" and "we strive to be in compliance with all regulations at all times." Notably, Blankenship was charged despite the imprecise nature of the statements, and the fact that they were drafted by others. Although he was acquitted on both false statement counts, their inclusion in the case may have contributed to the jury's guilty verdict on the third count. But regardless of their impact in this particular case, the very fact that a federal prosecutor would bring such charges is worth keeping in mind in many situations in which a company may wish to provide reassurance to the public.

Prosecutions of healthcare providers provide another example of cases in which false statement may play an important role. In a case in Chicago that came before the Seventh Circuit in 2013,[16] a vascular surgeon, John Natale, was alleged to have operated on ordinary aortic aneurysms, but billed Medicare at the higher rate provided for surgery on aneurysms involving the renal arteries, which in generally requires a more complex procedure. The government obtained an indictment against the surgeon that charged not only mail fraud and health care fraud but also violations of 18 U.S.C. § 1035, a false statement statute enacted in 1996 as part of the Health Insurance Portability and Accountability Act ("HIPAA").[17] Section 1035 was modeled on Section 1001 but applies to statements in "any matter involving a health care benefit program."[18]

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[13] *See* John R. Emshwiller & Gary Fields, *For Feds, 'Lying' Is a Handy Charge*, Wall St. J., Apr. 9, 2012, at A1.

[14] *United States v. Moore*, 612 F.3d 698, 702–03 (D.C. Cir. 2010) (concurring op.).

[15] *See United States v. Stewart*, 433 F.3d 273, 280 (2d Cir. 2006) (affirming convictions).

[16] *United States v. Natale*, 719 F.3d 719 (7th Cir. 2013).

[17] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[18] The statutory definition of a "health care benefit program" is sweeping, encompassing (i) public plans, private plans, and contracts that provide medical benefits, items, or services to individuals;

The Section 1035 charges alleged that Natale had made false statements in his operative reports which made it appear he had performed the more complex procedure, thereby justifying higher fees from Medicare.

At trial, a doctor who had been an attending physician, when Natale was a resident at the Rush Presbyterian hospital in Chicago, explained the technique for aneurysm repair that Natale had learned there and said it was more complex than the standard repair for aortic aneurysms. Natale testified that, because there was no Medicare billing code for the technique he used, he chose the Medicare billing code for the most similar procedure, in keeping with the instructions given in Medicare training sessions. As to the inaccuracies in the operative reports, Natale testified that he dictated as many as one hundred such reports at a time.

Natale's explanation of how he chose the billing code apparently went over all well, for the jury acquitted him on all three charges alleging health care fraud or mail fraud. It found him guilty, however, on the false statement charges under Section 1035. There were evidently too many untrue statements in Natale's operative notes for the jurors to believe he had made innocent mistakes. Natale later served ten months in prison.

The Department of Justice in 2014 did take one step that was helpful to defendants charged under either Section 1001 or Section 1035. When the Supreme Court years earlier had discarded the "exculpatory no" doctrine under Section 1001, Justice Ginsburg had pointed out in a concurrence that "[t]he Second Circuit, whose judgment the Court affirms, . . . left open the question whether 'to violate Section 1001, a person must know that it is unlawful to make such a false statement.'"[19] Addressing this open question, the Department of Justice told the Supreme Court that the word "willfully" in Sections 1001 and 1035 requires proof that the defendant knew he was acting unlawfully.[20]

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and (ii) and any individual or entity who is providing such benefits, items, or services for which payment may be made under a plan or contract. *See* 18 U.S.C. § 24(b).

[19] *Brogan*, 522 U.S. at 416 (Ginsburg, J., joined by Souter, J., concurring in the judgment) (quoting *United States v. Wiener*, 96 F.3d 35, 40 (2d Cir. 1996)).

[20] Br. for the United States in Opp'n at 12, *Natale v. United States*, No. 13-744 (U.S. Mar. 14, 2014) ("[I]t is now the view of the United States that the 'willfully' element of Sections 1001 and 1035 requires proof that the defendant made a false statement with knowledge that his conduct was unlawful."); Br. for the United States in Opp'n at 15, *Ajoku v. United States*, No. 13-7264, 2014 WL 1571930 (U.S. Mar. 10, 2014) ("[I]n the context of Sections 1001 and 1035, ['willfully'] should be interpreted to require proof that the defendant knew his conduct was unlawful."); Br. for the United States in Opp'n at 11, *Russell v. United States*, No. 13-7357, 2014 WL 1571932 (U.S. Mar. 10, 2014) (same); *see also United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009) (holding that under Section 1001 interpreting the term "willfully" to require "knowledge of the general unlawfulness of the conduct at issue . . . adequately demarcates the boundary between innocent and unlawful conduct"). In *Ajoku* and *Russell*, the Supreme Court granted certiorari, vacated the decisions below, and remanded for further consideration in light of the government's concessions

IV. INTERNAL INVESTIGATIONS

Any in-depth look into internal investigations and the reasons to conduct such an investigation, or to disclose the results to the government, are beyond the purview of this panel. However, it is important to mention them since often an internal investigation is the reason the government comes calling. A company conducts an internal investigation because it is aware of a problem and wants to identify it or in anticipation of defending itself. Whether to conduct an in-house investigation or to hire outside counsel must be considered and there are reasons for each.

But in keeping with the theme of this paper, what do you do once you have identified a problem? Although many government agencies believe voluntary disclosure is required, whether to make such a disclosure must be carefully weighed. The SEC or DOJ maintain that self-disclosure has benefits in the form of "credit." For example on November 29, 2017, Deputy Attorney General Rod Rosenstein announced a new DOJ enforcement policy for the matters implicating the Foreign Corrupt Practices Act (FCPA). The new policy is aimed at incentivizing the voluntary disclosure of corporate misconduct by providing companies with more certainty as to the benefits of cooperating with federal authorities. Under the new policy, there will be a presumption that the government should decline prosecution of companies that meet DOJ's standards of voluntary self-disclosure, full cooperation, and timely remediation. The new policy, however, is limited to cases arising under the FCPA. Thus, the company must still weigh, in cases where disclosure is not statutorily required, the downside of having the government show up at your door, demanding documents and high fines, which has been a prevalent practice in matters involving health care fraud. There is no that guarantee disclosure will result in non-prosecution or leniency.

Closely related is the decision whether the company will waive its attorney-client privilege. While it may seem advisable to cooperate with the government to receive potential leniency in one form or another, disclosure to the government generally waives the privilege for all of the subject matter and as to third parties as well as the government. *See, e.g., In re Qwest Commc'ns Int'l, Inc. Sec. Litig*, 450 F.3d 1179, 1201 (10th Cir. 2006); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684-86 (1st Cir. 1997). When conducting interviews of employees, counsel should assume that its interview notes and memoranda may have to be disclosed. Accordingly, the notes and memos should avoid interpretations and conclusory language and be as factually accurate as possible.

V. PARALLEL PROCEEDINGS

At the outset of this article, we considered the possibility that a civil client could find itself facing parallel proceedings. The facts and evidence giving rise to private civil cases often leads to simultaneous criminal investigations and prosecutions; administrative, regulatory, or civil enforcement actions; and even legislative investigations. Parallel proceedings pose unique challenges to civil clients and counsel. Invariably, civil clients must participate in expensive, simultaneous discovery on multiple fronts. Corporate executives and employees under scrutiny

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of error. *Ajoku v. United States*, 134 S. Ct. 1872 (2014); *Russell v. United States*, 134 S. Ct. 1872 (2014) (same).

frequently must weigh whether to testify or assert their Fifth Amendment privilege in civil cases, which can have adverse consequences. The government, for its part, may try to bar a civil client from taking discovery in a pending civil case by seeking a stay of the civil case until the completion of the criminal case or investigation. And competing interests frequently present obstacles to clients seeking global resolution of all proceedings.

A. DOJ's Policy on Parallel Proceedings

The likelihood that a civil client may become embroiled in parallel proceedings is probably greater today than ever. The financial crisis of 2008 spawned a host of related criminal investigations, regulatory proceedings and private lawsuits, and that trend has persisted in recent years. Presently, there has been unprecedented coordination between federal prosecutors, regulatory agencies, state attorneys generals in the investigation and prosecution of companies spanning a broad spectrum of industries.

DOJ has emerged as the leader in using parallel proceedings to combat alleged corporate misconduct. In the past five years, DOJ has issued two policy statements regarding the use of parallel proceedings. The first policy statement was the Attorney General's Memorandum dated January 30, 2012, and titled "Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings."[21] The policy statement was issued to ensure that "Department prosecutors and civil attorneys coordinate together and with agency attorneys in a manner that adequately takes into account the government's criminal, civil, regulatory, and administrative remedies."[22] It spells out guidelines that criminal, civil, and agency attorneys must follow at various key stages of a case, including intake, investigation, and resolution. For example, counsel are urged to collaborate regarding all types of available remedies, to devise investigative strategies that maximize the government's ability to share information, and to assess the potential impact of final resolution on all proceedings.[23]

On September 9, 2015, the Deputy Attorney General issued the second policy statement in a memorandum to all federal prosecutors regarding "Individual Accountability for Corporate Wrongdoing" (the *Yates Memo*).[24] The *Yates Memo* instructs criminal and civil attorneys to utilize parallel actions in the Department's efforts to combat corporate misconduct by holding individuals accountable. It advocates early and regular communication between criminal and civil attorneys handling corporate investigations as a critical means to effectively pursue individuals. Criminal attorneys are directed to notify civil attorneys as soon as possible of conduct that might lead to individual civil liability. If a decision is made not to pursue criminal charges against an individual, then criminal attorneys are to confer with their civil counterparts to assess whether civil remedies

[21] United States Attorneys' Manual (USAM), Title I, Organizations and Functions Manual 27.

[22] *Id.*

[23] *Id.*

[24] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, to All United States Attorneys (Sept. 9, 2015).

are available. Similarly, civil attorneys must refer matters to criminal prosecutors if they believe that a criminal investigation of an individual is warranted.[25] DOJ's aggressive stance on using its full arsenal of criminal, civil, and regulatory remedies in tandem will likely result in an increase of government parallel proceedings against civil clients.

B. Discovery and the Fifth Amendment

Parallel proceedings can be costly for a civil client as discovery typically proceeds simultaneously on multiple fronts, which presents civil clients and the government with significant strategic issues. Under federal discovery rules, discovery in civil cases generally is broad and permitted early in a case. By contrast, in criminal cases, discovery is far more limited from a defendant's standpoint. A defendant cannot depose the government's witnesses in a criminal case, and is not even entitled to production of prior statements of government witnesses until after they have testified on direct examination. Criminal discovery produced to defendants also is limited to items such as evidence that is material to the defense, impeachment information, exculpatory evidence, government exhibits, and the defendant's own statements.

Not surprisingly, this dynamic raises competing tactical considerations concerning whether it is advantageous for discovery to proceed in a civil or regulatory proceeding while a parallel criminal case is pending. A civil client faces a difficult dilemma. He may decide that it is necessary (or prudent) to assert the Fifth Amendment in response to discovery requests. But this carries the risk that the fact-finder will be permitted to draw an adverse inference against him as to the subject matter of the questions that he declined to answer. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). In addition, if a civil client invokes the Fifth Amendment during discovery, he faces the possibility that the court will later preclude him from testifying at trial. In *Connecticut General Life Ins. v. New Images of Beverly Hills*, 60 Fed. Appx. 87, 89 (9th Cir. 2003). There also can be severe collateral consequences when a civil client exercises his Fifth Amendment right, particularly if he is an officer or director of a publicly traded company.

On the other hand, if the civil client testifies in the civil proceeding, the government can later use his testimony against him in the criminal proceeding. There is the additional risk that the civil client could be charged with obstruction of justice or perjury based on his testimony in the civil case.

There may be circumstance in which a civil client nonetheless may benefit from parallel proceedings. The civil client may want to use the discovery process in the civil case to preview the government's criminal case. The civil client can depose the government's witnesses and request production of documents and other information that he may not otherwise obtain in the

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[25] According to the current Deputy Attorney General, Rod Rosenstein, DOJ is currently is reviewing the *Yates Memo*, and has recently stated that it intends to make an announcement in "near future about what changes we're going to make." http://www.heritage.org/the-constitution/event/constitution-day-address.

criminal case. In addition, if there is a favorable outcome in the civil case, the civil client may seek to use to persuade the government to forego any criminal prosecution.

The government, like the civil client, often does not want discovery to proceed in the civil case because it subjects its witnesses to being deposed and enables the civil client to obtain early discovery. Consequently, federal prosecutors often file motions to stay civil proceedings until the criminal case is completed. While such requests used to be routinely granted, some courts have increasingly scrutinizing whether a stay is appropriate. *See SEC v. Saad*, 229 F.R.D. 90, 92 (S.D.N.Y 2005) (district court denied government's application for a stay of discovery in SEC enforcement action filed simultaneously with criminal prosecution, rejecting government's argument that defendants would gain "special advantage" due to broader discovery available in civil case). The government also will file motions to stay private civil proceedings. In such cases, courts will consider several factors, including (1) the private interests of the plaintiff in proceeding expeditiously against the prejudice caused by delay; (2) the private interests of the defendant; (3) the convenience of the courts; (5) the public's interest; (6) the extent to which issues in the criminal case overlap with those in the civil case; and (7) the status of the criminal case, including whether the defendants have been indicted. *See, e.g., Arden Way Assoc. v. Boesky*, 660 F. Supp. 1494, 1496-1497 (S.D.N.Y. 1987); *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.* 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995).

In sum, whether a civil client is a company or an individual, it must make an important tactical decision whether to seek a stay of a civil proceeding. This may depend on how the client assesses the risks versus benefits of obtaining discovery in that proceeding. This decision requires careful analysis by both counsel and civil clients, as the consequences could potentially alter the outcome of all proceedings.

C. Constitutional Issues

Finally, courts have imposed some boundaries on the government's use of parallel proceedings, which a civil client may be able to exploit in an appropriate case. In a handful of cases, defendants have successfully attacked the government's use of parallel proceedings where there has been improper information sharing, a failure to provide notice of the parallel proceedings to a litigant or his counsel, or the use of deceit or trickery. In the oft-cited case of *United States v. Kordel*, 397 U.S. 1, 11-12 (1970), the Supreme Court held that evidence obtained from a civil investigation can be used later in a criminal investigation without violating the due process clause provided the government does not act in "bad faith." "Bad faith" may occur when the government brings a civil proceeding solely to obtain evidence for a criminal proceeding, and then fails to advise the defendant in the civil proceeding of the planned use of the evidence in the criminal prosecution. *Id.* at 11.

A significant decision involving "bad faith" in the context of parallel proceeding is the district court's opinion in *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1139 (N.D. Ala. 2005). In *Scrushy*, the DOJ and SEC were conducting parallel investigations of possible securities fraud by HealthSouth. DOJ informed the SEC that two HealthSouth officers had agreed to cooperate, and had provided information regarding a massive fraud. DOJ asked the SEC whether its lead accountant could attend the DOJ's interviews of the cooperating witnesses. The SEC agree to

DOJ's request that it refrain from questioning the witness because the government intended to use one of them to record conversations with the defendant. In ruling on the defendant's motion to dismiss, the district court concluded that the two investigations had improperly merged, which created the risk that the government could undermine rights that would exist in a criminal investigation by conducting a *de facto* criminal investigation through civil means. *Id.* at 1140. Relying on its supervisory power, the district court suppressed the defendant's SEC deposition testimony, and dismissed three perjury charges based on that testimony. The district court held that the government's actions departed from the proper administration of criminal justice by creating an acute danger of prejudice flowing from testimony at a civil proceeding when the defendant was unaware of the pending criminal charge. *Id.* at 1139.[26]

As demonstrated above, representing civil clients in parallel proceedings requires counsel's adroit navigation through a veritable minefield. In most instances, civil clients facing parallel proceedings would be well served by assembling a team comprised of counsel with civil, regulatory, and criminal expertise.

[26] *But see United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008) (reversing district court's order dismissing indictments based on finding that government violated defendants' due process rights by simultaneously pursuing criminal and civil proceedings, concluding there was no attempt to mislead counsel in the civil action and SEC Form 1662 provided defendants with sufficient notice that information could be used against them in subsequent proceeding).