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Top 10 Takeaways From ABA White Collar Crime Conference 2014 (Part 2 Of 2)

March 13, 2014 | | Government Investigations, The GEE Blog

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This is the second part of a two-part blog post. Part 1 can be accessed here: "Top 10 Takeaways from ABA White Collar Crime Conference 2014 (Part 1 of 2)"

6. Search warrants are being used in white collar cases more frequently than ever before.

The task of educating a client what to do in the event of a government search warrant may be an uncomfortable one. However, the willingness of the DOJ and SEC to use search warrants in white collar cases (and the fact that the government is not, as yet, obligated to use a "least intrusive alternative" approach) means that companies must have procedures in place in the rare event that the government does show up at the company's door with a warrant. Good procedures may minimize the client's exposure to additional problems down the road, such as the appearance of obstruction and the dissemination of privileged documents.

7. The government's use of "taint teams" remains problematic and difficult to address.

The panel addressing the government's use of search warrants in white collar cases focused in large part on government "taint teams" and the inherent privilege violation that occurs when anyone in the USAO reviews client documents that are privileged. The bad news is that courts are loathe to monitor the taint team review process or grant Rule 41(g) motions with respect to documents that are seized pursuant to a valid warrant. The good news (if there is any) is that taint teams, because they are made up of attorneys with no connection to the case who are "walled off" and have a busy caseload of their own, are inefficient, use up valuable resources, often miss relevant documents, and are generally a pain for the government.

8. The government will initiate undercover investigations

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with the help of whistleblowers if given the opportunity.

Several panelists addressed issues associated with whistleblower complaints. Chief Stokes remarked that the DOJ will investigate whistleblower allegations to make sure that they are serious and credible before taking action. However, the DOJ does not require the whistleblower to approach the company; indeed, Chief Stokes stated that if the company is not aware of the whistleblower allegations, the DOJ may use the information to launch an undercover investigation. This insight, among others, demonstrates the importance of a company's whistleblower program and the need for companies to encourage their employees to approach the company first and allow the company to address the issue to avoid law enforcement involvement.

9. The DOJ does not intend to issue any more FCPA guidance in the wake of the 2012 guide.

The DOJ representatives confirmed that the DOJ will not be issuing any additional FCPA enforcement guidelines beyond the 2012 guide, but instead will attempt to be more transparent in its charging and settlement documents in order to give practitioners more of an idea of the kinds of actions that will result in scrutiny. This is particularly true in the area of jurisdictional issues; indeed, Ex-Chief Duross noted that the FCPA unit should have explained the jurisdictional hook in the *Ralph Lauren* case more explicitly (which he noted primarily involved acts undertaken by a U.S. individual who was employed with the U.S. parent company). However, what constitutes "transparency" is still relatively unclear, particularly given the inability to release any information in connection with a declination.

10. Parallel criminal and civil proceedings are on the rise, and have the potential to make the government's job more difficult.

Defense counsel in white collar matters should be aware of the advantages that can be gained from parallel civil and criminal proceedings and the discovery that may be available to a criminal defendant when a civil case is ongoing. A civil case that proceeds at the same time as a criminal case may give the criminal defendant an opportunity to obtain discovery that would never be available in a criminal case, including depositions of government witnesses and exchange of a larger and more diverse set of discovery materials. One AUSA conceded that in the recent *Chiasson* case, the issue of the scope of discovery due to a parallel civil case caused constant battles in the criminal case and even resulted in the defendants being permitted to depose individuals with the potential to be cooperating witnesses.