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White Collar Crime Report™

YEAR IN REVIEW

Four attorneys with Keker, Van Nest & Peters LLP examine some of 2017's critical white collar and securities enforcement actions and identify some issues to watch in 2018. The authors also highlight several significant U.S. Supreme Court cases.

White Collar Crime and Securities Enforcement: 2017 in Review




BY BROOK DOOLEY, ERIC H. MACMICHAEL, NICHOLAS S. GOLDBERG, AND CECILY HARRIS

As the second year of the Trump administration continues, the most notable development in the white collar arena is the ongoing investigation *of the administration*. The investigation into collusion between Russia and the current administration dominated the white collar and regulatory landscape in 2017, and looks to continue that trend throughout 2018. 2017 also saw the U.S. Supreme Court limit the government's ability to impose draconian financial penalties against white collar defendants, as well as an uptick in public corruption prosecutions. This article highlights some of 2017's key white collar developments.

Russia Investigation

The investigation into Russian interference in the 2016 election has captivated the American public and white collar practitioners alike.

Comey Out One of the most shocking moments of Trump's presidency came on May 9, 2017, when the President fired then-FBI Director James Comey, citing Comey's mishandling of the investigation into Hillary Clinton's emails. It soon became clear, however, that Comey's firing was tied to the Russia investigation. In the weeks that followed, it was reported that President Trump had pressured Comey to drop the FBI's investigation into former National Security Advisor Michael Flynn, sparking speculation that President Trump committed, or attempted to commit, obstruction of justice.

Mueller on the Job In the wake of Comey's firing and Attorney General Jeff Sessions' recusal from the investigation, Acting Attorney General Rod Rosenstein appointed Robert Mueller as Special Counsel to investigate ''any links and/or coordination between the Russian government and individuals associated'' with Trump's campaign, and any matters that ''arose or may arise directly'' from the investigation. DOJ Order No. 3915-2017.

Mueller's investigation began to heat up in October 2017, with the indictments of Trump's former campaign manager Paul Manafort and his associate Rick Gates for conspiracy against the United States, conspiracy to launder money, false statements, and other charges arising from their work on behalf of a pro-Russian government in Ukraine. *United States v. Manafort*, No. 1:17-cr-00201 (D.D.C.). Mueller also revealed that Trump campaign foreign policy advisor George Pap-

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adopoulos had pled guilty to making false statements about his contacts with the Russian government during the campaign. *United States v. Papadopoulos*, No. 1:17-cr-00182 (D.D.C.). And in December 2017, former National Security Advisor Michael Flynn pled guilty to making false statements about his contacts with the former Russian ambassador to the United States, and agreed to cooperate. *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C.).

A Busy Start to 2018 Mueller's investigation has shown no signs of slowing down in 2018.

On February 16, 2018, Mueller indicted 13 Russian citizens and 3 Russian companies for conspiring to defraud the United States by interfering with the 2016 election. *United States v. Internet Research Agency LLC*, No. 1:18-cr-00032 (D.D.C.). Although these Russian defendants are unlikely ever to see the inside of a U.S. courtroom, the indictment lays out a detailed portrait of how the Russian government sought to influence the election by ''sow[ing] discord in the U.S. political system'' and used social media to engage in ''information warfare.''

On February 23, 2018, Gates pled guilty to conspiracy against the United States and making false statements, and agreed to cooperate with Mueller's investigation. Meanwhile, Mueller turned up the heat on Manafort with new tax and bank fraud charges. *United States v. Manafort*, No. 1:18-cr-00083 (E.D. Va.). And Alex van der Zwaan, a former Skadden attorney who helped write a report that Manafort commissioned on behalf of the Ukrainian government, pled guilty to making false statements and was sentenced to 30 days in prison. *United States v. van der Zwaan*, No. 1:18-cr-00031 (D.D.C.).

On April 9, 2018, the FBI raided the New York home and office of Michael Cohen, President Trump's longtime personal lawyer, in connection with allegations that Cohen violated campaign finance laws and engaged in bank and wire fraud by paying hush money to an adult film star who allegedly had an affair with Trump.

What's Next? As Mueller's investigation continues, we will be looking for answers to four key questions:

First, will Mueller survive? As Trump rails against the Russia investigation as a ''witch hunt,'' reports have swirled that the President has tried, and may try again, to fire Mueller. Removing Mueller could lead to a political crisis harkening back to Nixon's Saturday Night Massacre, and set up a showdown between the President, his own Justice Department, and Congress.

Second, did Trump obstruct justice? Mueller reportedly is investigating a series of actions by Trump for possible obstruction, including: asking Comey to drop the Flynn investigation, then summarily firing him; drafting a misleading statement about a campaign meeting between Donald Trump Jr. and a Russian lawyer with ties to the Kremlin; threatening to remove Sessions, Rosenstein, and Mueller; and dangling possible pardons to Flynn and Manafort. Whether Trump obstructed, or attempted to obstruct, justice likely hinges on the President's intent. Mueller reportedly has categorized Trump as a ''subject''—not a ''target''—of the investigation, and sought to interview the President. Trump has waffled on whether he is willing to sit down with the Special Counsel, but doing so would be a risky proposition for a President who has a loose relationship with facts.

Third, will Mueller establish that anyone in Trump's orbit conspired with Russia? The indictment in *Internet Research Agency* is vague on the role of the Trump campaign, alleging only that defendants communicated with ''unwitting individuals'' associated with Trump's campaign. In a press release accompanying the indictment, DOJ stated that there is no allegation that any American ''was a knowing participant in the alleged unlawful activity.'' President Trump seized on this to declare in a tweet that Mueller had shown ''no collusion!'' But the fact that Mueller has not alleged misconduct by people affiliated with Trump's campaign does not necessarily mean that he lacks evidence to support such a claim or that he will not develop it in the future.

Finally, even if Mueller finds criminal wrongdoing by the President, there is a thorny question antecedent to any attempt to prosecute him: Does the Constitution allow a sitting President to be criminally prosecuted? DOJ's Office of Legal Counsel (OLC) has twice concluded that a sitting president is immune from criminal prosecution because prosecution would ''impermissibly interfere with the President's ability to carry out his'' constitutional duties. (*See* Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973); Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, to Janet Reno, Att'y Gen., Re: A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000)). By contrast, two different memos—one authored by the Office of Special Counsel investigating Richard Nixon, and another by the Office of Independent Counsel investigating Bill Clinton—reached the opposite conclusion. (*See* Memorandum from Carl B. Feldbaum et al. to Leon Jaworski, Watergate Special Prosecution Force (Feb. 12, 1974); Memorandum from Ronald D. Rotunda to Hon. Kenneth W. Starr, Independent Counsel, Re: Indictability of the President (May 13, 1998)). It is unclear whether OLC's position that a sitting president is immune from prosecution is binding on Mueller. But even if Mueller concludes that he has authority to bring charges against a sitting President Trump, he may, for prudential reasons, defer to Congress to initiate impeachment proceedings.

Supreme Court

Kokesh v. SEC

In June 2017, the U.S. Supreme Court unanimously held that the five-year statute of limitations contained in 28 U.S.C. § 2462 applies to the remedy of disgorgement sought in an action brought by the U.S. Securities and Exchange Commission. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). The Court rejected the government's argument that disgorgement is remedial in that it ''restore[s] the status quo,'' and held that ''[b]ecause disgorgement orders go beyond compensation, are intended to punish, and label defendants wrongdoers as a consequence of violating public laws, they represent a penalty and thus fall within the 5-year statute of limitation of § 2462.'' *Id.* at 1645 (internal quotation marks and citation omitted).

In 2009, the SEC brought an action against Charles Kokesh alleging that he misappropriated $34.9 million

of investor funds between 1995 and 2006. The SEC conceded that § 2462 precluded any penalties for misappropriation that had occurred prior to Oct. 27, 2004—five years prior to the date the SEC filed the complaint. However, the SEC persuaded the district court that a $34.9 million disgorgement judgment was not a ''penalty'' within the meaning of § 2462 and therefore no limitations period applied. The district court ordered Kokesh to pay the $34.9 million in disgorgement—$29.9 million of which related to conduct outside the limitations period.

The U.S. Supreme Court granted certiorari to resolve a circuit split over whether § 2462 applies to claims for disgorgement in SEC enforcement actions. After affirming the principle set out in *Gabelli v. SEC*, 568 U.S. 442 (2013), that statutes of limitations specifying when exposure to government enforcement action end are ''vital to the welfare of society,'' the court held that SEC disgorgement constitutes a penalty subject to the five-year limitations period in § 2462. *Id.* at 449. The Court's reasoning was straightforward and relied exclusively on an analysis of the Court's own precedents.

Aftermath of *Kokesh* While Kokesh certainly deals an immediate blow to the SEC's leverage in enforcement actions that span several years, the more interesting questions arise out of the Court's famous ''footnote 3,'' which reads as follows: ''Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings *or on whether courts have properly applied disgorgement principles in this context*.'' 137 S. Ct. at 1642 n.3 (emphasis added). Courts are just now starting to grapple with the significance of this footnote, and it will be interesting to see how they address challenges to the use of disgorgement in SEC enforcement proceedings and whether the remedy of disgorgement will be confined to something less punitive and more recognizably ''equitable.''

Honeycutt v. United States

In another June 2017 ruling, the Supreme Court ruled unanimously in *Honeycutt v. United States* that the federal criminal asset forfeiture statutes are ''limited to property the defendant himself actually acquired as the result of the crime.'' 137 S. Ct. 1626, 1635 (2017). Thus there is no ''joint and several liability'' for forfeiture among members of a criminal conspiracy, unless the individual conspirator ''acquired'' or ''personally benefit[ed]'' from the forfeitable property.

The facts in *Honeycutt* were straightforward: Terry Honeycutt managed sales and inventory at a hardware store owned by his brother. It was undisputed that he ''had no controlling interest in the store and did not stand to benefit personally'' from its sales. *Id.* at 1628. Over the course of three years, the store sold massive quantities of a water purifier used to manufacture methamphetamine, even though they were advised by law enforcement to stop selling it. After being indicted on federal drug distribution charges, Terry's brother pled guilty and agreed to a forfeiture judgment of $200,000.

After Terry was convicted at trial, the government sought a forfeiture judgment against Terry for the remaining $69,000, on the theory that co-conspirators should be ''jointly liable'' for forfeitable criminal proceeds. The district court, however, declined to order forfeiture because Terry ''was a salaried employee who had not received any profits from the sales.'' *Id.* The U.S. Court of Appeals for the Sixth Circuit reversed, and the Supreme Court granted certiorari to resolve a circuit split on the question.

The Supreme Court reversed the Sixth Circuit, concluding that joint and several liability—''[a] creature of tort law''—is not permitted under the criminal forfeiture statute, 21 U.S.C. § 853(a). The Court focused on the statutory language authorizing forfeiture, which applies to property ''*obtained* . . . as a result of'' the crime. (emphasis added). The word ''obtain,'' the Court pointed out, has a plain and clear definition, which does not encompass ''property that was acquired by someone else.'' *Honeycutt*, 137 S. Ct. at 1629.

Given the straightforward facts in *Honeycutt*, the Court's opinion does not examine what it means for a defendant to ''obtain'' or ''acquire'' the proceeds from an illegal scheme. Similarly, the Court did not explain what it means to ''personally benefit from'' the proceeds of an illegal conspiracy such that forfeiture could be appropriate.

United States v. Microsoft

In April 2018, the Supreme Court dismissed a closely watched dispute regarding the federal government's ability to access data stored abroad by service providers, agreeing that recently enacted federal legislation rendered the fight moot.

The Court granted certiorari in *United States v. Microsoft* in October of 2017, after DOJ appealed a Second Circuit ruling that quashed a warrant issued under the Stored Communications Act that would have compelled Microsoft to produce customer emails housed on a server located in Ireland. In 2013, the federal government had served a warrant on Microsoft at the company's Washington state headquarters, seeking information about an email account that the government believed was being used for drug trafficking. Microsoft challenged the warrant, arguing that it could not be required to turn over the emails because they were stored in Ireland and U.S. law does not apply overseas. The federal government asserted it should be allowed to reach data stored abroad because this information is controlled by service providers that disclose it to officials within the U.S.

The case was argued in February of 2018, but before the Court could decide it, the case was mooted by Congress' passage of a spending bill on March 22, 2018, that included the Clarifying Lawful Overseas Use of Data (CLOUD) Act.

The CLOUD Act amends a provision in the Electronic Communications Privacy Act of 1986 to make clear that warrants and other legal processes issued for data held by service providers like Microsoft and Google reach data stored anywhere in the world. That standard addresses the central question in *Microsoft* and thus mooted the dispute before the Court.

In addition to clarifying the federal government's authority to compel disclosure of data stored overseas, the new legislation authorizes the U.S. to enter into bilateral data-sharing agreements for law enforcement purposes, while allowing service providers to move to quash a warrant if they believe there is a ''material risk'' that the request would violate the laws of a foreign government.

Insider Trading And Securities Enforcement

Martoma

In August 2017, a divided panel of the Second Circuit upheld the insider trading conviction of former SAC Capital portfolio manager, Mathew Martoma, in a case prosecutors once dubbed the most lucrative insider trading scheme ever prosecuted. *United States v. Martoma*, 869 F.3d 58 (2d Cir. 2017). In so doing, the court struck a near fatal blow to its landmark decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), concluding that the Supreme Court's ruling in *Salman v. United States*, 137 S. Ct. 420 (2016), eviscerates *Newman*'s requirement that tippers and tippees have a ''meaningfully close personal relationship.''

Martoma had argued that the trial court's jury instructions were erroneous in light of *Newman*, and that the evidence was insufficient because his tipper was only a casual acquaintance who was not paid for providing tips. The majority rejected those arguments, holding that the ''logic'' of *Salman* abrogated *Newman*'s ''meaningfully close personal relationship'' requirement, and that there was ''overwhelming evidence'' the tipper received a financial benefit.

While *Martoma* marks a significant victory for prosecutors who contended that *Newman* hamstrung insider trading prosecutions, the lasting impact of the decision remains to be seen. Judge Rosemary Pooler issued a spirited 44-page dissent, arguing that the majority opinion ''radically alters insider-trading law for the worse.'' *Martoma*, 869 F.3d at 75. And in October 2017, Martoma petitioned for *en banc* review, setting up a possible showdown before the full Second Circuit or perhaps the U.S. Supreme Court.

Shkreli and Greebel

In August 2017, a federal jury in Brooklyn convicted notorious ''pharma bro'' Martin Shkreli of two counts of securities fraud and one count of conspiracy to commit securities fraud, but acquitted him of five other counts of conspiracy. *United States v. Shkreli*, No. 1:15-cr-00637 (E.D.N.Y.). The charges stemmed from allegations that Shkreli defrauded investors in his hedge funds by lying about the funds' performance, and looting the assets of his former drug company, Retrophin, to pay off aggrieved investors.

Reputed to be ''America's most hated man,'' *Shkreli* highlights the challenge of empaneling an impartial jury in high-profile cases with infamous defendants. More than 200 prospective jurors had to be dismissed due to comments like: ''I'm aware of the defendant and I hate him;'' ''I think he's a greedy little man;'' ''When I walked in here today I looked at him, and in my head, that's a snake;'' ''From everything I've seen on the news, everything I've read, I believe the defendant is the face of corporate greed in America;'' ''I already sense the man is guilty;'' ''I don't think I can [be open-minded] because he kind of looks like a d***;'' and ''The only thing I'd be impartial about is what prison this guy goes to.'' https://harpers.org/archive/2017/09/public-enemy/.

Shkreli's toxicity may have spilled onto his former lawyer Evan Greebel. Prosecutors alleged that Greebel aided Shkreli's fraudulent scheme by drafting sham agreements to pay investors in Shkreli's hedge funds using Retrophin assets, and helping Shkreli control the price of Retrophin stock to uphold the appearance that the company was financially stable. *United States v. Greebel*, No. 1:15-cr-00637 (E.D.N.Y.). During trial, Greebel's lawyers tried to distance their client from Shkreli and paint Greebel as a victim of Shkreli's lies. But, in December 2017, a Brooklyn jury convicted Greebel of conspiracy to commit wire and securities fraud.

In March 2018, Shkreli was sentenced to seven years in prison. Meanwhile, Greebel has moved for a judgment of acquittal or for a new trial, citing, among other things, insufficient evidence and juror misconduct.

Litvak

2017 was *déjà vu* for ex-Jefferies & Co. bond trader Jesse Litvak. In 2014, Litvak was convicted of misrepresenting bond prices and sentenced to two years in prison, only to have his conviction wiped away by the Second Circuit in 2015. *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015). In January 2017, Litvak was retried and acquitted of nine of ten charges, in what many white-collar practitioners saw as a defense victory. *United States v. Litvak*, No. 3:13-cr-00019 (D. Conn.). But in April 2017, Litvak was yet again sentenced to two years in prison on the lone count on which he was convicted relating to a single mortgage-backed bond deal. Litvak again appealed to the Second Circuit. And on May 3, 2018, the Second Circuit again tossed out Litvak's conviction, ruling that the trial court had erred by allowing the buyer on the deal to testify about his mistaken belief that Litvak was the buyer's agent. *United States v. Litvak*, No. 17-1464-cr, 2018 BL 157147 (2d Cir. May 3, 2018).

Public Corruption

Since its publication in June 2016, the Supreme Court's opinion *McDonnell v. United States*, 136 S. Ct. 2355 (2016), has had an outsized effect on public corruption prosecutions. *McDonnell* is noteworthy for its significant cabining of what constitutes an ''official act'' under the federal anti-bribery statute. Specifically, in *McDonnell* the Court held that in order to prove that an individual performed an official act for purposes of section 201, the government must first identify ''a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official'' that would involve ''a formal exercise of governmental power, such as a lawsuit, hearing or administration determination.'' *Id.* at 2368. The government must then show that ''the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.'' *Id.* These standards substantially narrowed the parameters of conduct that could qualify as ''official acts.'' From reversals in high profile convictions to abrupt changes in prosecutorial decision-making, *McDonnell* continued to reshape the legal landscape of public corruption cases in 2017.

Boyland

In a notable affirmance of a post-*McDonnell* bribery conviction, in *United States v. Boyland*, the Second Circuit held that although the jury instructions given ''were erroneous in light of the standard set by *McDonnell*,'' the errors did not affect the substantial rights of New York State Assemblyman William Boyland. 862 F.3d

279, 291 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 938 (2018). Boyland was charged with soliciting bribes in connection with a proposed carnival and real estate venture for which state monies were to be obtained. The trial court instructed the jury that an official act could include ''contacting or lobbying other governmental agencies,'' which runs directly contrary to *McDonnell*'s holding that ''[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not'' constitute an ''official act.'' *Id.* at 290 (quoting *McDonnell*, 236 S. Ct. at 2372). Nevertheless, the error did not affect Boyland's substantial rights because the carnival and real estate schemes ''were concrete matters that, in order to proceed as planned, required formal governmental decisions.'' *Id.* at 291. Therefore, even though the instructions were flawed, the court saw ''no reasonable possibility, in light of the record as a whole, that that flaw affected the outcome of the case.'' *Id.* at 292.

Silver

Just three days later, the Second Circuit decided *United States v. Silver*, which vacated the conviction of former Speaker of the New York State Assembly Sheldon Silver on the basis of an overly broad definition of ''official act.'' 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018). The jury had been instructed that ''any action taken or to be taken under color of official authority'' qualified as an ''official act,'' whereas under *McDonnell*, such an act had to be ''a decision or action on a 'question, matter, cause, suit, proceeding or controversy' involving 'a formal exercise of governmental power.' '' *Id.* at 105-06.

On remand to the district court, Silver moved to dismiss partly based on an argument that *McDonnell* precludes the ''as opportunities arise'' theory of bribery. That theory provides that ''the requisite *quid pro quo* for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts . . . as the opportunities arise.'' *United States v. Silver*, No. 1:15-cr-00093, ECF 365 at 7 (March 20, 2018) (quoting *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007)). Judge Caproni denied Silver's motion to dismiss, holding that *McDonnell* solely concerned the specificity of the ''matter on which official is *ultimately* taken'' rather than the ''as-opportunities-arise'' theory of bribery. *Id.* at 7-8 (emphasis in original). That decision shows *McDonnell*'s limitations and the unwillingness of at least one trial court to extend it beyond its holding. On May 11, 2018, Silver's two week re-trial concluded. He was found guilty on all charges.

Skelos

Rounding out a trilogy of important post-*McDonnell* Second Circuit cases is *United States v. Skelos*, in which Dean Skelos, the former Majority Leader of the New York State Senate, and his son, Adam Skelos appealed their bribery and extortion convictions. The Skeloses had been convicted after a four week trial in November 2015, at which the jury was instructed that an ''official act'' may include ''acts customarily performed by a public official.'' *United States v. Skelos*, 707 F. App'x 733, 736 (2d Cir. 2017). Although prosecutors had ''presented overwhelming evidence'' of the defendants' guilt at trial, the Second Circuit vacated the convictions. *United States v. Skelos*, 2016 BL 118632 (S.D.N.Y. Apr. 14, 2016). The court found that the jury instruction was contrary to *McDonnell*'s holding that ''charging 'official act' to include 'acts that a public official customarily performs' raises 'significant constitutional concerns' because it could cover 'nearly anything a public official does' on behalf of constituents.'' *Skelos*, 707 F. App'x at 763 (quoting *McDonnell*, 136 S. Ct. at 2373-74). The Skeloses' retrial is scheduled for June 2018.

Two other prosecutions exemplify *McDonnell*'s reach and bear mentioning. First, the case brought against U.S. Sen. Robert Menendez (D-N.J.) for bribery and fraud. After a nine-week trial at which the jury failed to reach a verdict on all counts, the district court granted Menendez's motion for acquittal on 7 of the 18 charges. Shortly thereafter, the DOJ dismissed the remaining charges against the senator, seemingly due to the limited evidence available following the court's order and the difficulty in meeting the heightened bar set by *McDonnell*. This was a major win for Menendez, who plans to seek re-election in 2018.

Second, in December 2016, the First Circuit overturned the RICO and fraud convictions of three high-ranking officials in Massachusetts' Office of the Commissioner of Probation (OCP). *United States v. Tavares*, 844 F.3d 46 (1st Cir. 2016). Although the court agreed that the defendants had ''catered to hiring requests from members of the state legislature with the hope of obtaining favorable legislation for the Department of Probation and the OCP,'' it nevertheless found that the government had not proven a violation of federal law. *Id.* at 49. Central to the court's reasoning was the government's failure to show that the defendants had given something of value in return for an ''official act,'' as defined in *McDonnell*. *See id.* at 56-58.

Nearly two years after *McDonnell*, courts and litigants alike are still grappling with the Supreme Court's narrowed definition of what constitutes an ''official act'' under the federal anti-bribery statute. The reversals of Silver's, the Skeloses', and the *Tavares* defendants' convictions, as well as the dropped case against Menendez, exemplify that in a post-*McDonnell* world the government must narrowly focus prosecutions on concrete governmental actions rather than conduct that could be characterized as advocacy in support of constituents.

Other Notable Cases

Allen

In *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017), the Second Circuit considered the novel question of whether and to what extent the Fifth Amendment's prohibition on the use of compelled testimony applies to the use of testimony compelled by a foreign sovereign. The key issue was the propriety of the government's use at trial of the testimony of a witness who had reviewed interview transcripts of the defendants that were compelled by the U.K. Financial Conduct Authority (FCA). Critically, the FCA contains no right to refuse to testify on the grounds that it may be self-incriminating. The Second Circuit overturned the defendants' convictions, holding that the government had failed to prove that ''the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the government.'' *Id.* at 101.

Although this case illustrates a court enforcing U.S. constitutional principles even as they contradict other

sovereigns' laws, it should not be read too broadly. Indeed, the court carefully distinguished the Fifth Amendment's protection against self-incrimination from the Fourth Amendment's exclusionary rule. The protections of the former ''apply in American courtrooms,'' no matter whether testimony was compelled by American or foreign officials, whereas evidence gleaned from an unlawful search by a foreign sovereign would likely ***not*** be excluded because the policy justifications underlying any potential exclusion would not be implicated. *Id.* at 82.

Dewey

The seemingly endless saga of the criminal case against former executives of the defunct law firm Dewey & LeBoeuf finally concluded in 2017. In May 2017, a Manhattan jury convicted former Dewey CFO Joel Sanders of securities fraud and conspiracy, while acquitting the firm's former executive director, Stephen DiCarmine, of the same charges. Sanders and DiCarmine had been tried alongside the Dewey's former chairman, Steven Davis, in 2015, but the jury deadlocked. Over a year and a half later, prosecutors re-tried Sanders and DiCarmine, this time succeeded in securing Sanders' conviction. Davis struck a deal with prosecutors, avoiding a re-trial. In October, Sanders was sentenced to a hefty fine and community service, but no jail time.

Blankenship

In January 2017, the Fourth Circuit upheld the conviction of Donald Blankenship, the former chairman and CEO of Massey Energy, for conspiracy to violate federal mine safety laws stemming from the 2010 explosion at Massey's Upper Big Branch mine that killed 29 miners. *United States v. Blankenship*, 846 F.3d 663 (4th Cir.), *cert. denied*, 138 S. Ct. 315 (2017). After serving his one-year sentence, Blankenship was released from prison in May 2017, and ran for the U.S. Senate in West Virginia, losing in the Republican primary May 8.

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