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CORPORATE CRIME

Company Counsel as Agents Of Obstruction

Last month, The New York Times gave front page coverage in its business section to three guilty pleas in the Computer Associates International, Inc. case, featuring the government's pursuit of a theory that the defendants had obstructed governmental investigations by making false statements to counsel for the company.[1] This article will describe the foundation for the government's prosecution of the three officers of Computer Associates who pleaded guilty to those obstruction charges and will explore the implications of those charges for counsel who conduct internal investigations.

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Prosecutions

On April 8, 2004, three former high-ranking executives of Computer Associates pled guilty to securities fraud and obstruction of justice in the Eastern District of New York. Computer Associates, a leading manufacturer of computer software for business and a one-time darling of the Wall Street investment community, had been under investigation since early 2002. Charges filed by the U.S. Attorney and simultaneously by the Securities and Exchange Commission detailed a financial fraud in which Computer Associates accelerated recognition of hundreds of millions of dollars of revenue by backdating license agreements and otherwise falsifying records in order to meet Wall Street estimates for quarterly earnings.

In addition to telling the story in their charging instruments of this financial fraud, both the U.S. Attorney and the SEC went on to describe in detail events that unfolded after the government started investigating Computer Associates in early 2002. As described in those charges, after the governmental investigations began, Computer Associates retained a law firm which met with the government and committed that the company would cooperate with the investigations. At the same time, according to the criminal informations, Computer Associates asserted in press releases, SEC filings and other public statements that its financials were accurate and consistent with applicable accounting principles.

The criminal informations against each of the three former executives — all of whom held responsible positions in the chain of command of Computer Associates financial reporting — then charge that each of the defendants, on specified occasions, met with the law firm that was conducting the company's internal investigation and made false and misleading statements about the company's financial reporting practices. The criminal informations specifically charge that the defendants knew and intended that their false statements would be transmitted to the U.S. Attorney's Office and to the SEC. Similar allegations were made with respect to interviews conducted by another law firm that was retained by the audit committee of the board of directors, namely, that the defendants lied to that law firm in interviews knowing that their false statements would be conveyed to the government.

Conspiracy and Obstruction

The three criminal informations each contain two counts: a securities fraud conspiracy and a conspiracy to obstruct justice. The obstruction charge recites that at the time each defendant met with the company's law firm and with the audit committee's law firm, he "well knew and believed that his false statements and concealment of material information would have the effect of obstructing and impeding the Government Investigations."[2]

SEC complaints, also filed on April 8 against each of the former executives, similarly detailed in its factual allegations specific incidents in which each of the defendants obstructed the SEC's staff's investigation by lying to Computer Associates' counsel or to counsel for the audit committee. Then, in charging violations of the securities laws, the SEC included as foundational facts supporting those securities law violations each paragraph that alleged the making of false statements to counsel.

These three criminal prosecutions for obstruction based on statements made by defendants to counsel for the company and counsel for the audit committee are completely unremarkable as a matter of criminal law. The criminal information, to

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which each of the defendants pleaded guilty, makes clear that the defendant specifically intended to have the lawyers deliver his false statements to the government. Thus, the legal theory being utilized is no more than a pure agency theory, under which a criminal act is accomplished by way of communication through another person.

These informations cited as the object of the conspiracy the obstruction statute enacted in Sarbanes-Oxley, 18 U.S.C. §1512(c)(2)(2), which augmented the existing obstruction statute, 18 U.S.C. §1512(b), by removing the need to prove that the obstruction involved corruptly persuading another person. Under 1512(c), the crime of obstruction can be committed directly by a person who "corruptly …obstructs, influences, or impedes any official proceeding or attempts to do so… ." In fact, either statute could have been used in these prosecutions on the facts admitted by the defendants on their guilty pleas.

While the legal theory of obstruction in these cases may be unremarkable, the government's decision to found these obstruction charges on statements to lawyers is notable as a further example of governmental actions that are changing the role of counsel for the corporation. The government's decision in the Computer Associates prosecutions to pursue a theory of obstruction achieved by means of an internal investigation reinforced an already resonating message that internal investigations are becoming extensions of the government's investigations.

While the obstruction charges in Computer Associates reflect that the defendants intentionally used the internal investigation as a means to obstruct the government's investigations, the government made clear by bringing the charges that it was prepared to use an internal investigation as a means of criminal prosecution.

The government's willingness to use the internal investigation as the foundation for an obstruction charge must be viewed in the larger context of the government's even greater demands for companies to "cooperate" by conducting prompt internal investigations, by waiving corporate privileges and by reporting the results to the government.

In the past, company counsel conducting those investigations — even where a company has committed in advance to report the results to the government — have not seen the role of counsel as being functionally the same as the role of the prosecutor. Yet, as the Computer Associates obstruction prosecutions now suggest, a lie to company counsel who is reporting to the government on the progress of the internal investigation can be made the legal equivalent of a lie to the prosecutor.

Practice Points

These obstruction prosecutions raise the issue of whether company counsel has any obligation to advise employees at the outset of an interview that their statements — if untrue — could result in a federal charge of criminal obstruction. Our Code of Professional Responsibility in New York, specifically DR5-109, explicitly requires counsel for a corporation to advise employees that counsel represents the company and does not represent the individual employee.[3] Consistent with that, corporate counsel also advises the employee that any privilege that pertains to the interview is the company's privilege and that the company controls any decision to waive the privilege.

The disciplinary rule is intended to be fair to the employee. Should company counsel, as a matter of fundamental fairness, also let employees know before they submit to any interview that if the results of the investigation are reported to the government and if the government decides that the employee lied in the interview, the employee may be criminally prosecuted for obstruction of justice based on the interview?

While considerations of fairness may militate in favor of giving such a warning, the countervailing consideration is the likely chill that such a warning would have on the effort to collect information that the company needs for a successful investigation.

The inability to collect the facts hampers counsel's ability to represent the company effectively, by ascertaining if violations of law have occurred, if disciplinary action or personnel changes are warranted, if public disclosure is required under the securities laws, and if curative action, including cooperation with the government, is called for.

Ironically, the government's decision to make use of interviews in an internal investigation as a basis for obstruction charges may have a deleterious effect on the very processes that the government has been seeking to foster by insisting on "cooperation" by corporations.

Nevertheless, the obstruction prosecutions in Computer Associates should cause counsel to review with corporate clients their current practices for statements to employees in interviews conducted for internal investigations, both generally and with particular focus on investigations that are intended from the outset to result in reports to the government.

If the standard warnings are not augmented by a specific reference to the risk of an obstruction charge, they could be augmented, alternatively, by a general caution to the employee that it would be prudent to consider the fact that statements made in the interview may be conveyed to the government.

In the meantime, counsel has to stop and to consider that any interview conducted in these circumstances may become part of the government's investigation and, ultimately, may become a basis for a criminal charge. Questions from the employee about the need for personal counsel have to be answered with these new developments in mind.

Notes and memos of the event also have to be handled with the care appropriate to an event that could put an employee in criminal jeopardy. Finally, counsel has no choice but to consider the possibility that the government may put counsel in the center of criminal charges both as a witness to a crime and as the intermediary through whom a crime was committed.

1. Alex Berenson, "Case Expands Types of Lies Prosecutors Will Pursue," New York Times, May 17, 2004.

2. *United States of America v. Kaplan*, Cr. No. 04-330 (ILG) at 27; *United States of America v. Zar*, Cr. No. 04-331 (ILG) at 33; *United States of American v. Rivard*, Cr. No. 04-332 (ILG) at 28.

3. 22 NYCRR 1200.28 (McKinney 2003).