

Ninth Circuit Rules That Government Need Not Disclose Simultaneous Criminal Investigation

April 8, 2008

The U.S. Court of Appeals for the Ninth Circuit issued an important opinion on April 4, addressing governmental conduct and defendant constitutional rights in parallel civil and criminal investigations. The court ruled that it is not a constitutional violation or an abuse of the investigative process for the government to keep secret the active, ongoing coordination of civil and criminal investigations of an individual, even when asked directly by counsel whether civil authorities are working in conjunction with criminal authorities.

In *United States v. Stringer*, No. 06-30100 (April 4, 2008), the court reversed the dismissal of criminal indictments against three defendants alleging falsification of the financial records of their company. The district court had ruled that the government violated defendants' constitutional rights by using "trickery and deceit" to conceal the existence of the concurrent civil and criminal investigations, and by conducting a criminal investigation under the auspices of a civil investigation. The Ninth Circuit disagreed, holding that there was no deceit; rather, at most there was a governmental decision not to conduct the criminal investigation openly.

On June 8, 2000, the SEC began an investigation of FLIR Systems, Inc. and the three defendants concerning the alleged falsification of FLIR's financial records. Several weeks later, the SEC held the first of a series of meetings with the Oregon United States Attorney's Office (USAO) to coordinate a possible criminal investigation, and within days, the USAO and the FBI opened a criminal investigation. That same month, the SEC gave its investigative files to the USAO and routinely provided documents and information to the USAO throughout the course of its investigation. At the beginning of the criminal investigation, the USAO identified to the SEC two defendants as possible targets and later also identified the third defendant as a target. The SEC and USAO also agreed that the criminal investigation should remain confidential because of concerns that the presence of a criminal investigation would halt SEC civil discovery and impede witness cooperation and potential settlements with the SEC. In September 2002, two defendants settled with the SEC; in September 2003, all three were indicted on criminal charges.

The SEC assisted the criminal investigation by agreeing to conduct interviews and depositions in a manner and place that would facilitate criminal false statement charges. Moreover, when asked by counsel for one defendant at a deposition whether the USAO was involved in the investigation, the SEC attorney responded that it was the SEC's policy not to respond to such questions, and referred the attorney to Form 1662, which contains a standard disclosure that the Commission may make its files available to other government agencies. Form 1662 also warns that statements made in a civil proceeding may be used against the individual in criminal proceedings. When counsel asked which

USAO he should contact, the SEC attorney responded that would be a matter left up to counsel's discretion. At another deposition, the SEC instructed the court reporter not to tell counsel that an Assistant United States Attorney had been assigned to the case.

The Ninth Circuit ruled that the use of evidence obtained through an SEC investigation in a criminal proceeding does not violate a defendant's Fifth Amendment right against self-incrimination where there was no deceit on the part of the government. The court concluded that the defendants' waivers of their Fifth Amendment rights were valid as they and their counsel were put on notice, both at the time of their depositions and through Form 1662, that the information obtained may be used in a criminal investigation.

The court also ruled that the civil investigation was not used solely as a guise to conduct a criminal investigation in violation of the defendants' due process rights, noting that the SEC commenced its investigation first, issued sanctions, and conducted the investigation in accordance with SEC jurisdiction. Thus, the civil investigation was not a pretext for the criminal investigation.

Finally, the court concluded that the SEC's refusal to answer with respect to the USAO's involvement did not amount to "trickery and deceit" on the part of the government. The government did not violate defendants' Fourth Amendment or due process rights because the SEC did not make any affirmative misrepresentations to mislead defendants and did not deceive the defendants into believing that the investigation was exclusively civil in nature. The court further pointed out that Form 1662 sent by the SEC disclosed the possibility that evidence would be provided to assist in a criminal investigation.

This case underscores the need for corporate counsel to be extremely proactive and vigilant in determining the involvement of criminal authorities in SEC investigations. This case makes clear that the government likely has no affirmative obligation to disclose criminal presence in civil investigations other than to point to standard language on a standard form provided to all witnesses. Counsel would be wise to press for a candid yes-or-no response to a good-faith inquiry about concurrent investigations, and to always be aware of the possibility of parallel investigations.

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