



WHITE COLLAR CRIME REPORT



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HIGHLIGHTS**Ninth Circuit Resurrects Indictments in FLIR Financial Fraud Prosecution**

The Ninth Circuit rules that there was “no deception or affirmative misconduct” by the government during the course of parallel civil and criminal investigations against three former executives of FLIR Systems Inc. and reinstates the indictments that were thrown out after a federal district court concluded the government had abused the investigative process. **Page 229**

Court Declines to Presume Reasonableness of Within-Range Sentence

The en banc Ninth Circuit announces that it, unlike many other circuit courts, will not afford a “presumption of reasonableness” on appeal to sentences within the range recommended by the U.S. Sentencing Guidelines, but it does say that a within-guidelines sentence will probably be reasonable in most cases. The court also recaps principles that can be drawn from the U.S. Supreme Court’s recent sentencing cases. **Page 242**

U.N. Procurement Official Gets Eight Years in Prison for Bribery

The former chief of the commodity procurement section in the United Nations’ Procurement Division is sentenced in federal court in New York to spend 97 months in prison in connection with his convictions for accepting hundreds of thousands of dollars’ worth of benefits from a U.N. vendor. **Page 239**

Former Latham & Watkins Partner Pleads Guilty to Stealing From the Firm

A former partner at Latham & Watkins LLP pleads guilty in federal court in New York to one count of mail fraud in connection to charges that he stole hundreds of thousands of dollars from the firm and its clients. **Page 236**

Miami Woman Draws 10 Years in Prison for \$170 Million Medicare Fraud

A Miami woman is sentenced in federal court to 10 years’ imprisonment and ordered to pay \$105 million in restitution for her role in a \$170 million scheme to defraud the Medicare program. **Page 239**

Privilege Holder Must Take Swift Action After Forced Production of Material

The Tenth Circuit clarifies the circumstances in which compelled production of confidential materials results in waiver of attorney-client privilege or work-product protection, making clear that the privilege holder must specify which materials are protected and inform the opponent without delay that protected material has been obtained, and if necessary, seek judicial relief. **Page 243**

Analysis & Perspective

BRIBERY: A review of recent Foreign Corrupt Practices Act cases shows the government’s increasingly expansive view of the act and its willingness to prosecute, which translates into a greater potential for liability and hence a need for heightened sensitivity toward compliance. **Page 253**

ALSO IN THE NEWS

GOVERNMENT AFFAIRS: The U.S. Supreme Court lets stand a federal appeals court ruling that the FBI search of Rep. William Jefferson’s (D-La.) congressional office in 2006 was unconstitutional. **Page 247**

CAMPAIGN FINANCE: Puerto Rico Governor Anibal Acevedo Vilá (D) and 12 other people are charged in a superseding indictment alleging a scheme to make illegal contributions. **Page 231**

TAX ENFORCEMENT: The Seventh Circuit rules that a district court’s obligation to establish a payment schedule when imposing restitution does not apply to the imposition of a criminal fine in a tax case. **Page 244**

BRIBERY: The former chief executive officer of National Century Financial Enterprises is found guilty of trying to bribe a witness in his upcoming trial on multiple counts of conspiracy, wire fraud, securities fraud, and money laundering. **Page 236**

BNA CONFERENCE: “The New Lobbying Law: A Sea Change, Part II—Understanding and Implementing the Changes.” Monday, May 5, Washington Marriott Hotel, Washington, D.C., 8 a.m.-5:30 p.m. Special discount for BNA subscribers. For complete program and registration information, visit <http://legaledge.bna.com>

duct the appeal on an expedited basis and that the government has not given a compelling reason to do so.

Robert P. Trout, of Trout Cacheris PLLC, Washington, D.C., said that the constitutional issues involved in the case are too important to be examined hastily, adding that the protections invoked by Jefferson are critical to maintaining congressional independence and the separation of powers.

Ongoing Corruption Probes. Jefferson is one of several current members of Congress believed to be the subject of ongoing federal corruption investigations and is one of two current lawmakers who have actually been indicted and scheduled for a trial. The other indicted House member is Rep. Rick Renzi (R-Ariz.), who is also fighting corruption charges (3 WCR 127, 02/29/08). Renzi's trial, which was scheduled to begin April 29 in federal court in Arizona, has been delayed until October at the earliest.

Renzi's request to delay the trial cited the complexities of the case and the fact that the defense was only beginning to receive substantial evidence gleaned from wiretapped conversations involving Renzi. An April 9 report in *The Hill* newspaper said FBI wiretaps of Renzi had picked up his conversations with other members of Congress, though there was no indication that other lawmakers are being investigated in the case.

Two other legislators have pleaded guilty in recent corruption probes, agreeing to waive possible defenses based on the speech-or-debate clause. Ney pleaded guilty in 2006 to charges involving taking favors from lobbyist Jack Abramoff in exchange for official actions (1 WCR 640, 10/27/06). He was sentenced in January 2007 to 30 months in prison (2 WCR 14, 02/2/07). Also, former Rep. Randy "Duke" Cunningham (R-Calif.) pleaded guilty in late 2005 to bribery-related charges and was sentenced to eight years in prison (1 WCR 93, 03/17/06).

Accounting Fraud

Former Network Associates CFO Fails To Overturn Financial Fraud Convictions

The U.S. District Court for the Northern District of California March 21 rejected a bid by former Network Associates Inc. Chief Financial Officer Prabh Goyal to overturn a jury verdict finding him guilty on securities fraud charges arising from his role in a scheme to inflate revenues and earnings at the company (*United States v. Goyal*, N.D. Cal., No. 3:04-cr-201, 3/21/08).

Among other matters, the court said the government "offered competent testimony" that certain NAI business practices were inconsistent with generally acceptable accounting principles. In an opinion by Judge Martin J. Jenkins, the court also rejected Goyal's motion for a new trial.

The accounting scheme at NAI—now known as McAfee Inc.—had both civil and criminal legal repercussions for a number of people, including Goyal. In early 2006, McAfee itself agreed to pay \$50 million to resolve Securities and Exchange Commission accounting fraud charges.

The case was one of two settlements the commission used to demonstrate its new policy for the imposition of corporate penalties.

In June 2004, Goyal was charged both civilly and criminally with scheming to inflate his company's revenues and earnings. The SEC civil charges—including that Goyal sold NAI stock while in possession of inside information about the fraud scheme—were stayed pending conclusion of the criminal proceedings.

Last year, Goyal was convicted on 15 counts of securities fraud (2 WCR 271, 05/25/07). Jurors unanimously concluded that Goyal filed false reports with regulators and lied to outside auditors, among other matters.

According to court records, Stephen A. Jonas and Christopher R. Noyes, both of WilmerHale, Boston, Elizabeth I. Rogers, of WilmerHale, Palo Alto, Calif., Ronald C. Machen, of WilmerHale, Washington, D.C., and Leslie F. Brown, San Francisco, all represented Goyal. Elise Becker and Brian Stretch, of the U.S. Attorney's Office, San Francisco, prosecuted the case.

Export Controls

Acquitted Defense Contractor Wins Reimbursement of Legal Fees From DOJ

An Alabama defense contractor who was acquitted of violating the Arms Export Control Act last year won another victory April 2 when a judge in the U.S. District Court for the Northern District of Alabama ordered the Justice Department to reimburse him for legal fees and costs incurred while defending himself in the federal prosecution (*United States v. Certain Real Property*, N.D. Ala., No. CV 06-J-1102-NE, 4/2/08).

Judge Inge P. Johnson ruled that Alexander Noore-din Latifi and his company, Axion Corp., are entitled to government reimbursement for their costs incurred as a result of the government's three-year criminal investigation and civil forfeiture action against them.

"It's a revolutionary ruling and case," said Henry Frohsin, of Baker, Donelson, Bearman, Caldwell & Berkowitz, Birmingham, Ala., who represented Latifi along with Baker Donelson attorneys Jim Barger, Catherine Long, J. Elliott Walthall, and Doreen Edelman.

"We believe Axion is the only company ever to win such a ruling in an arms export control case," Frohsin said. "We could not be more pleased for Alex Latifi and his company but the battle is far from over. His family-owned \$50 million . . . defense contracting company has basically been decimated. Alex is now fighting to get his company and his reputation back, and the government remains a fierce opponent."

Frohsin said the ruling will allow Latifi to collect about \$500,000 in expenses.

Fees Awarded Under CAFRA. An investigation of Latifi and Axion began in 2003, when the company employed about 60 people and had annual revenue of about \$4 million, Frohsin said. During the course of the investigation, the government froze \$2.5 million of Latifi's business and personal assets.

Prosecutors alleged that Latifi violated the AECA by illegally sending to China sensitive military technology involving parts to the propeller assembly for the Army's Black Hawk helicopter.

Following the acquittals of Latifi and the company in October 2007 on all counts, the government moved to dismiss the civil forfeiture action. However, federal prosecutors fought Latifi's request for attorneys' fees.

The fees were awarded under the Civil Asset Forfeiture Reform Act, a 2000 law designed to give owners who are innocent of any wrongdoing the means to recover their property, Frohsin said. Calling such an award groundbreaking, he noted that it is likely the first of its kind in Alabama or the Eleventh Circuit.

Latifi's attorneys said that the order follows the government's recent decision to withdraw its request for a ruling from the court that there was reasonable cause for the asset seizures. The withdrawal, they said, prevented Latifi from deposing U.S. Attorney Alice H. Martin and to examine the Justice Department's prosecutorial memos and investigative methods in the case.

CAFRA provides that the government must pay the reasonable attorneys' fees and other litigation costs of a claimant that "substantially prevails" in a federal civil forfeiture proceeding.

Johnson concluded in the Axion case that a claimant has substantially prevailed when the case is dismissed with prejudice, and she rejected the government's bid to avoid the fee-shifting provision by having the action dismissed without prejudice. To accept the government's position "would render the fee-shifting provisions of CAFRA essentially meaningless," the judge said. For example, she explained,

the government would be allowed to avoid the fee-shifting provision of CAFRA in every subsequent case by seeking a stay in the civil case and pursuing the criminal case. If the government was unsuccessful in the criminal case then it could simply move to have the civil case dismissed without prejudice and sidestep the application of CAFRA. This court finds that this result would be contrary to the stated intent of CAFRA "to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." H.R. 192, 106th Cong. (1999).

According to the Baker Donelson attorneys, there were more than 100 AECA criminal prosecutions in 2007, with the Axion case being the only defeat for DOJ. Latifi's lawyers believe the case will change the way DOJ pursues AECA cases.

"The Axion case is a clear signal to the DOJ and to future defendants that a guilty plea is not always the answer to an AECA charge," Barger said. "The Axion case may ultimately have the positive effect of encouraging the government to focus on developing meritorious cases, rather than pursuing weak or marginal cases of dubious merit."

The court's order is at <http://pub.bna.com/cl/061102.pdf>

Tax Evasion

Justice Department Says Billionaire Developer Should Serve No Jail Time for Lying on Return

The Justice Department agreed that billionaire California real estate developer Igor M. Olenicoff should serve no jail time for failing to disclose tens of millions of dollars in overseas accounts on his 2002 tax return, according to a government sentencing position filed March 31 in the U.S. District Court for the

Central District of California (*United States v. Olenicoff*, C.D. Cal., No. 8:07-cr-00227, 3/31/08).

Olenicoff, who was No. 215 on Forbes Magazine's list of the 400 richest Americans for 2006, pleaded guilty in December 2007 to one count of filing a false 2002 tax return. Forbes said his net worth was \$1.6 billion in 2006.

Judge Cormac J. Carney scheduled sentencing for April 14, at which time Olenicoff faces up to three years' imprisonment.

The presentencing report in the case recommended that Olenicoff serve only one year probation. However, the government has recommended he serve three years' probation to ensure Olenicoff's future compliance with U.S. tax laws.

In recommending no prison time, the government noted that Olenicoff paid \$52 million to the Treasury Department prior to the entering the plea agreement.

According to court records, Edward M. Robbins Jr., of Hochman, Salkin, Rettig, Toscher & Perez PC, Beverly Hills, Calif., is representing Olenicoff. Brett A. Sagel, of the U.S. Attorney's Office, Santa Ana, Calif., is prosecuting the case.

Government Affairs

House Panel Says Gift Rule Bars Lobbyists From Offering 'Nominal' Items

It is now officially off-limits for a lobbyist to take a House member or staffer out for a drink or a cup of coffee, according to a new ethics manual released by the House ethics committee.

The manual stipulates for the first time that an exception to the House gift rules for items of "nominal value"—such as drinks, snacks, or coffee—does not allow a lawmaker or staffer "to accept food or refreshments . . . in a one-on-one setting with a registered lobbyist."

Noting that the interpretation was new, the ethics panel said in a footnote to the manual that it would be applied "prospectively only, given the absence of previous definitive guidance on this point."

The new interpretation of the nominal-value exception was highlighted April 4 in a bulletin e-mailed by ethics attorney Ki Hong, of Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C. Hong said the provision tracks a less formal interpretation of the same point recently handed down by the Senate Ethics Committee.

The House ethics panel—known formally as the House Committee on Standards of Official Conduct—posted a new 456-page manual on its Web site on March 25. The manual incorporates changes required under ethics rules adopted by the current, Democratic-controlled Congress.

'Reception Rule.' The new rules generally have banned all gifts from lobbyists and lobbying organizations, but they also incorporated exceptions that had applied to previous gift restrictions, such as the exception for items of nominal value. This provision did not set a dollar threshold but was widely viewed as allowing an exception for any gift worth up to \$10, according to ethics experts.