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The Crimes of the New Century

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CRIMINAL JUSTICE

By Robert Sanger

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Introduction

There is no doubt that the economic recession will result in more prosecutions for white collar crime. Civil and transactional counsel will advise clients not to cut corners due to economic stress - but clients do not always follow our advice. In the wake of the recession in 1989-1992 and the bursting of the dot.com bubble in 2000, there were dramatic increases in white collar prosecutions. Those increases reflected the detection and prosecution of actual criminal behavior. But the increases also reflected prosecutions for nothing more than what was regarded as a brilliant business strategy but then, in the wake of losses, was considered criminal.

Either way, corporate counsel have to watch for the first signs of a criminal investigation and take appropriate action. A timely corporate criminal investigation and early intercession with the United States Attorney's Office can sometimes head off indictment. And, we have to be ready for new and creative prosecutions. Economic downturns have a way of empowering new agencies. There is a certain amount of empire building and self-promotion built upon the investigation and prosecution of new crimes. We have seen this in the wake of the depression in the 1930's and as recently as the Sarbanes-Oxley Act of 2002. To properly advise

businesses and to be alert for potential investigations, we have to be aware of these new potential investigative and prosecutorial offices.

In response to our latest economic downturn, we have yet another a brand new basis for federal white collar prosecutions and the brand new federal office overseeing the prosecutions. Although they have indicted only one case as of this writing, the office has made it clear that it wants to move ahead rapidly. The new head of this office announced, “We really need to press forward on these things because, unlike the traditional prosecutorial law enforcement investigation, where the end is the indictment and bringing justice, which is important, here we have such an important role in deterrence that it’s very important for us to get these charges out quickly.”

Of course, “quickly” can mean efficiency and it can also mean a rush to judgment. In the area of white collar crime, in which there is so much grey area, quickly can mean expensive investigations and devastating consequences if there is an indictment.

TARP

The man making these remarks is a 38 year old former Assistant United States Attorney, Neil Barofsky. He is the head of a new agency of the federal government which can have wide reaching prosecutorial jurisdiction. He is the Special Inspector General of the newly created Troubled Assets Relief Program (TARP). He works with the SEC, the FBI, Treasury and numerous other government law enforcement agencies. He has a current staff of 35 and is looking to expand his staff to 150 with a new budget of \$50 million dollars.

The role of the Special Inspector General of TARP (SIGTARP), as interpreted by Barofsky, is to do civil and criminal enforcement relating to any fraud associated with federal bailout funds. He claims that criminal prosecutions will be an important part of his job saying, “We are the only ones doing them.” As quoted in the Introduction, he believes that he and his office have to get indictments out quickly. He believes that such early and aggressive prosecutions will serve as a deterrent to out of control fraudulent behavior.

TARP and its Special Inspector General have been conducting audits and doing grand jury investigations. They have been looking at banks themselves and the use of federal bailout funds. They are looking at allegations of undue influence and improper lobbying in the acquisition of funds by institutions and the lending practices of those institutions. The investigations are confidential pre-indictment and time will tell what range of activities is coming within the scope of their criminal investigations.

One expects that Congress intended that TARP and its Special Inspector General would be occupied tracing the billions of dollars paid out to banks and big businesses. Inevitably, there will be abuses and outright theft of funds as well as more subtle indiscretions in the use of these monies. Certainly, existing government agencies such as the FBI and prosecutors in the United States Attorneys Offices have jurisdiction to investigate and prosecute misappropriations. However, this is big money taxpayers may feel more comfortable if there is governmental oversight by a new federal agency over the disbursement and use of these funds.

TARP Prosecutions and the Ordinary Business Person

But there is another whole area of prosecution that TARP and its Special Inspector General Barofsky have decided to look into. If Barofsky chooses to aggressively pursue this area, his powers of prosecution will take him into the affairs of the ordinary business person including those who never received federal funds. In other words, instead of focusing on major federal “players” in the bailout scheme, he could expand his new office into the prosecutions of ordinary allegations of mail and wire fraud And money laundering.

In fact, that is the precise case of the very first criminal indictment obtained based on a SIGTARP investigation - the only actual criminal prosecution out of TARP as of the time of this writing. It is the prosecution of a Tennessee investment adviser, Gordon Griggs, who is alleged to have engaged in a typical ponzi scheme. The case was indicted in federal court in Tennessee. The amount of loss was sizeable, \$10 million, but small compared to the potential for billions of dollars at risk for fraud in the bailout programs themselves. Griggs has reportedly admitted wrongdoing and is attempting to negotiate a plea agreement.

What makes the case far reaching to criminal practitioners is that there is no allegation that TARP funds were involved or even applied for. In fact, it is a material allegation in the indictment that no such funds or application for funds ever existed. Instead, Griggs is being prosecuted for saying that he was investing pooled client funds in the purchase of "TARP guaranteed debt." And, in fact, it is alleged that there is no such thing as "TARP guaranteed debt."

The Implications of the Griggs case

Griggs could have implications for the expansion of investigative and prosecutorial powers of this new federal law enforcement agency. As we have all become aware, there are more and more criminal investigation and law enforcement agencies in the federal government. Each agency, as it is formed, starts to grow and arrogates to itself more and more power and jurisdiction. Turf wars - fights over jurisdiction - among federal agencies are legion. Here, an office that was created at the very end of last year is already asserting, in its first case, that it should have jurisdiction over what amounts to ordinary mail and wire fraud and money laundering.

These three federal crimes are prosecuted regularly in federal court daily without involving SIGTARP - these allegations are the staple of the FBI, the Postal Inspection Service and the United States Attorneys Office. In other words, there are ample federal and state agencies and resources available to prosecute Griggs without SIGTARP. Other than expanding jurisdiction and "growing an office" there is little reason why SIGTARP should divert its resources from the bigger investigations and actual bailout fund fraud.

Furthermore, the ramifications of prosecuting a person like Griggs for a TARP related crime could be enormous. Being suspected of using the name of the federal agency or perhaps implying association with some aspect of bailout funds, even if it does not result in any immediate impact on bail out funds, a business can be exposed to investigation and possibly prosecution by this new government agency. Of course, the conduct alleged in the Griggs case is criminal - that is not the point. The issue here is that the office of SIGTARP has shown its intention to delve into the mundane. Investigations inevitably will take place where the allegations are not well founded and, some will be the result of unfounded claims of disgruntled investors. As we acknowledged earlier, in times following economic downturns where people lose money, there are often criminal investigations into conduct that was not regarded as unlawful when business was profitable.

Conclusion

Time will tell if this new agency, SIGTARP, regulates itself. If not, it may have to be reined in. Meanwhile, it is yet one more federal agency whose activities corporate counsel and white collar criminal defense lawyers have to be vigilant to detect.