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CORPORATE CRIME REPORTER

GIBSON DUNN'S WALDEN WANTS TIGHTER RULES GOVERNING CORPORATE CRIME SETTLEMENTS

The Justice Department's Antitrust Division has set down some pretty strict rules governing when to charge – or not charge – a corporate crime based on corporate cooperation.

So, why can't the Department come up similar rules governing foreign bribery?

Or any other kind of corporate crime?

Well, it can.

And it should.

That's the take of Jim Walden.

Walden is a partner at Gibson, Dunn & Crutcher in New York.

"There can be a set of rules that provide transparency and some uniformity concerning when a corporation gets a non prosecution, or a deferred prosecution – or when it is required to pay a civil settlement," Walden told *Corporate Crime Reporter* in an interview last week. "Right now those decisions are made on a case by case basis and subject to very little consistency. I don't believe that serves the government or companies very well. And so, while you couldn't model it directly on the antitrust model, you could take a page from that playbook and devise a system that provides for greater transparency and uniformity and gives companies a set of rules that they can apply so that they know – if we hire a law firm, and we can accelerate this investigation, and we can get the initial phase of it done within let's say 90 days, and the government determines we have substantially moved forward the investigation, we will qualify for consideration of a non prosecution agreement instead of a deferred prosecution agreement."

Walden says that now, there is "a lot of subjectivity in that area, and a lack of transparency in a way that I don't think is good for the government or for corporations."

"And then there is the possibility of some sort of common interest agreement that would allow the company to share work product with the prosecuting authority in a way that wouldn't constitute a waiver of the attorney client privilege with respect to third parties," Walden said. "People at the top of corporations are extremely smart and mindful of trying to abide by rules. And when those rules deal with corporate cooperation, the government will get more, and we will all get more by increasing transparency and uniformity."

Walden sees a place for corporate crime prosecution – but in egregious cases – like the Computer Associates case.

In that case, Walden represented Lloyd Silverstein, a former Computer Associates vice president.

"In my mind, these types of cases fall into two categories," Walden said. "Cases where there should be a general rule in favor of non prosecution. And then cases where at a minimum there should be a deferred prosecution and if anything there should be a presumption of a prosecution that is only counterbalanced by overwhelmingly significant cooperation."

"In Computer Associates, there was pervasive fraud married with obstruction. So, it would fall in the category where there should be a presumption of a prosecution. I wasn't the prosecutor who handled the prosecution. But I understand that the cooperation after the obstruction was exposed was extraordinary. So, I can't quibble with their substantial settlement, which included a significant financial penalty with a deferred prosecution agreement. Although, it was a very close call."

[See Interview with Jim Walden, page 13]

REPORT SAYS SOME TYPES OF SECURITIES OUGHT TO BE PROHIBITED

A new report on the financial meltdown calls for strict regulation on the creation of certain types of derivatives based on the degree of separation from the actual, real-world transaction.

The report – *Financial Regulation After the Fall* – was written by the economist Robert Kuttner and was released last week at the National Press Club.

The report was released in conjunction with an all day conference titled *Beyond the Meltdown: Regulatory Reform of the Financial Sector.*

(See **KUTTNER**, page three)

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(**KUTTNER**, from page one)

The conference was sponsored by Demos, Essential Information and the Consumer Education Foundation.

During the lunch break, Kuttner was scheduled to interview Vanguard Group founder John Bogle.

In the report, Kuttner argues that some types of securities ought to be prohibited because "in the absence of clear definitions of what is permitted, financial engineers can play an endless cat-and-mouse game with regulators."

"In the era of strict financial regulation, which ended in the 1970s, there was no covert innovation around regulation, because certain activities were flatly and categorically prohibited," Kuttner writes. "S&Ls could only make certain kinds of loans. Banks could not pay interest on demand deposits. Commercial banks could not perform the functions of investment banks. There was no interstate branching. There were usury ceilings. As innovators attempted to breach these constraints, it took explicit political and regulatory complicity to permit the breaches. These may have been good or bad policy changes, but the claim that it is institutionally impossible to evaluate and constrain potentially hazardous innovations is nothing but a convenient myth."

"How is the world worse off and the economy less efficient if entire categories of derivatives simply do not exist?" he asks.

In addition to banning some types of derivatives, Kuttner also suggests that credit rating agencies "be turned into public institutions or non-profits accountable directly to the SEC, on the premise that they carry out a public function that is too important to the economic efficiency of credit markets and too easily corrupted to be left in private hands."

And he suggests that the government nationalize a bank or two.

"Should government take over at least one bank, not only to clean it up and improve its management, but to be a role model of resumed lending and prudent practice?"he asks.

"Sweden, after a similar collapse, used such a technique in the 1980s," Kuttner writes. "The entire banking system was temporarily nationalized, and then, after its balance sheets had been cleaned up, mostly sold back to the private sector, but with more effective controls. In the current British version of the crisis, the U.K. has gone much further in this direction than the U.S. This idea is not as far fetched as it may seem, since temporary nationalization is effectively what the FDIC does when it takes over a failed bank such as Indy Mac. For the time being, the failed bank becomes a government-owned entity, with hundreds of competent civil servants actually serving as senior managers of the bank. FDIC policy is to work out a merger if possible, as in the case of Washington Mutual, and take the failed institution over as a last resort – and then sell it off when it has been cleaned up."

Kuttner is also cool to securities industry self-regulators like The Financial Industry Regulatory Association (FINRA).

"There is a good argument that the whole self-regulation model has failed, and that something as fundamental to the integrity of the nation's capital markets as the conduct of stock exchanges, broker-dealers, and investment bankers should revert to the SEC itself – or at the very least to an independent nonprofit responsible to the SEC rather than to the regulated industry, such as PCAOB in the case of accountants," Kuttner writes. "President Obama recently appointed Mary Schapiro, chief executive of FINRA, to chair the SEC. This will either be a case of someone who knows the weaknesses of self-regulation all too well bringing her insider knowledge to a strengthened SEC and rising to the occasion – or it just will be another disappointingly weak appointment reflecting the still pervasive industry influence."

TYSON FOODS PLEADS GUILTY AND AGREES TO PAY FINE FOR OSHA VIOLATION THAT LED TO WORKER DEATH

Tyson Foods Inc. pled guilty last week in U.S. District Court in Arkansas and will pay $500,000 – the maximum fine for willfully violating worker safety regulations that led to a worker's death in its River Valley Animal Foods (RVAF) plant in Texarkana, Arkansas.

According to the information filed along with a plea agreement, Tyson operated several RVAF plants that recycled poultry products into protein and fats for the animal food industry.

As part of the rendering process in four of the plants, the company used high-pressure steam processors called hydrolyzers to convert the poultry feather into feather meal.

Decomposition of biological material such as poultry feathers produces hydrogen sulfide gas, an acute-acting toxic substance.

Employees at the Tyson facilities often were exposed to the toxic gas when working on or near the hydrolyzers, which required frequent adjustment and replacement.

As of October 2003, corporate safety and regional management were aware that hydrogen sulfide gas was present in the RVAF facilities and three of the four facilities with hydrolizers had taken measures to protect employees from hydrogen sulfide gas near the hydrolyzers.

However, Tyson Foods did not take sufficient steps to implement controls or protective equipment to reduce exposure within prescribed limits or provide effective training to employees on hydrogen sulfide gas at the Texarkana facility despite an identical exposure, resulting in hydrogen sulfide poisoning of an RVAF Texarkana employee in March 2002.

As a result, at approximately 1 a.m. on Oct. 10, 2003, RVAF maintenance employee Jason Kelley was overcome with hydrogen sulfide gas while repairing a leak from a hydrolyzer and later died. Another employee and two emergency responders were hospitalized due to exposure during the rescue attempt.

Two employees also were treated at the scene.

"Federal laws require employers to undertake steps that limit exposure to dangerous substances like the gas that killed Jason Kelley. Tyson Foods willfully ignored these regulations and today is being held responsible," said Ronald J. Tenpas, Assistant Attorney General for the Justice Department's Environment and Natural Resources Division. "The Justice Department takes its enforcement responsibility seriously and companies that ignore these laws and risk their employees' lives will be prosecuted."

The Occupational Safety and Health Act (OSHA) requires that employers furnish places of employment free from recognized hazards that are likely to cause death or serious physical harm to employees.

This includes taking steps to ensure that employee exposure to dangerous substances such as hydrogen sulfide gas remains within prescribed limits. Tyson Foods pleaded guilty today to a "willful violation of an OSHA standard resulting in the death of an employee," the most serious offense available to OSHA.

Tyson Food will pay $500,000, the maximum criminal fine. The company also will serve one year probation.

LEO BURNETT AD FIRM PAYS UNITED STATES $15.5 MILLION TO SETTLE OVERBILLING ALLEGATIONS ON ARMY CONTRACT

Leo Burnett Company, a Chicago advertising firm, has agreed to pay the U.S. $15.5 million to settle allegations that the company submitted false claims to the U.S. Army, the Justice Department announced today.

The firm had a contract from 2000 to 2005 with the Army to provide advertising services for the military service's recruiting mission.

The settlement resolves allegations that Leo Burnett improperly billed the Army while developing the recruiting Web site and for advertising under the "Army of One" multimedia advertising campaign. Leo Burnett will make a cash payment of $12.1 million and credit the Army $3.4 million in work performed, but not billed.

The settlement resolves the lawsuit filed on behalf of the U.S. government by former Leo Burnett employees, Greg Hamilton and Michele Casey, who received $2,790,000 as their share of the recovery in the case. Under the False Claims Act, private citizens can bring suit on behalf of the United States and share in any recovery obtained by the government.

The litigation and settlement of this case were conducted by the U.S. Attorney's Office for the Northern District of Illinois and the Justice Department's Civil Division.

"The Pentagon's Defense Criminal Investigative Service will aggressively pursue allegations of fraud that are perpetrated against the Department of Defense," said Sharon Woods, Defense Criminal Investigative Service director.

"The American people trust us to ensure their tax dollars are spent appropriately and we will continue to aggressively seek out and investigate those who intend to defraud the Army and the American taxpayer," said Brigadier General Rodney Johnson, Commanding General of the U.S. Army Criminal Investigation Command.

TELEDYNE REYNOLDS TO PAY $825,000 TO RESOLVE ALLEGATIONS IT BILLED THE AIR FORCE FOR UNALLOWABLE EXECUTIVE COMPENSATION

Teledyne Reynolds, Inc. (TRI), a Los Angeles-based manufacturer of high-voltage connectors and cable products, will pay the government $825,000 to settle civil allegations that it fraudulently overbilled the Air Force.

The settlement resolves allegations voluntarily disclosed by TRI through the Department of Defense's Voluntary Disclosure program.

TRI disclosed that, from 1999 through 2004, it had billed the Air Force for unallowable "senior executive compensation" costs in excess of the limits set by the United States.

The Federal Acquisition Regulations limit the amount of senior executive compensation that can be charged as a cost to government contracts. By billing for executive compensation above those limits, TRI received payments from the Air Force to which it was not entitled.

The unallowable costs were charged when the company was known as Reynolds Industries, Inc.

The name was changed to TRI in connection with its acquisition by Teledyne Technologies in 2004.

TRI agreed to the settlement without admitting any wrongdoing. The settlement represents approximately twice the government's loss.

OKLAHOMA PIPELINE COMPANY TO PAY PENALTY FOR JET FUEL SPILL

The Explorer Pipeline Company will pay a $3.3 million civil penalty in order to resolve an alleged violation of the Clean Water Act stemming from a July 14, 2007, spill of over 6,500 barrels – approximately 275,000 gallons – of jet fuel from its interstate pipeline at a location near Huntsville, Texas.

The United States' complaint, which was filed on Oct. 2, 2008 in the U.S. District Court for the Southern District of Texas, alleges that Explorer discharged oil into navigable waters of the United States in violation of the Clean Water Act.

On July 14, 2007, Explorer's 28-inch interstate refined petroleum products pipeline ruptured near Huntsville and jet fuel spilled onto the surrounding area and into nearby Turkey Creek.

Turkey Creek flows to the Trinity River at the upper reaches of Lake Livingston.

In earlier responses to the spill, Explorer replaced the section of pipe that ruptured, completed cleanup of the impacted waters and adjoining shorelines, is cooperating in a joint federal and state natural resource damage assessment, and commenced additional assessment and followup work.

The Clean Water Act makes it unlawful to discharge oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in quantities that may be harmful to the environment or public health.

The penalty paid for this spill will be deposited in the federal Oil Spill Liability Trust Fund managed by the National Pollution Fund Center.

The Oil Spill Liability Trust Fund is used to pay for federal response activities and to compensate for damages when there is a discharge or substantial threat of discharge of oil or hazardous substances to waters of the United States or adjoining shorelines.

SPARTAN MOTORS TO PAY $1.7 MILLION TO SETTLE KICKBACK CASE

Spartan Motors and its subsidiary, Spartan Chassis, will pay the United States $1.7 million to resolve allegations that it paid kickbacks to an employee of Force Protection Inc. to receive the subcontract to provide chassis for armored vehicles for the United States Military.

Federal officials alleged that Spartan paid approximately $100,000 to an employee of Force Protection in return for that employee's agreement to have Force Protection purchase truck chassis from Spartan to be used for both the Army's and the Marine Corp's Mine Resistant Ambush Protected (MRAP) vehicles.

The settlement resolves Spartan's potential civil liability under the Anti-Kickback statute.

Under the Anti-Kickback statute, a party is civilly liable to the United States for twice the amount of the kickback paid plus up to $10,000 per incident. Federal officials alleged that Spartan paid kickbacks for the sale of 136 chassis.

"This settlement evidences the United States' determination to combat schemes that undercut the integrity of the military's procurement of necessary products," said Gregory G. Katsas, Assistant Attorney General of the Justice Department's Civil Division. "We are pleased to have been able to

resolve this matter. This is a significant settlement," said Walt Wilkins, U.S. Attorney for the District of South Carolina. "Corporations and individuals alike must act in an honorable, ethical and legal manner when contracting to provide goods and services to the government."

CALIFORNIA EXECUTIVE PLEADS GUILTY TO FRAUD IN CONNECTION WITH SALES OF PARTS FROM CHINA

The president of a southern California company pled guilty to engaging in a conspiracy to commit honest services wire fraud by depriving a manufacturing company of the honest services of its employee.

Yong Zhu, the president of a Chino, Calif.-based importing and exporting company that supplies Chinese parts to U.S. companies, including parts used in items destined for military restraints for the U.S., pleaded guilty today in the U.S. District Court in Islip, N.Y., to a one count charge of conspiracy to commit honest services wire fraud.

Zhu pled guilty to participating in a wire fraud scheme between 2002 and 2004.

The conspiracy was carried out by telephone and in face-to-face meetings.

During the time of the conspiracy, he paid the employee of a manufacturing company approximately $10,000. In return, the employee provided Zhu with sensitive pricing information that assured Zhu's company would receive subcontracting awards from the manufacturing company.

Under the plea agreement, Zhu has agreed to cooperate with the Department's ongoing investigation. The terms of the plea agreement are subject to court approval.

"Today's charge demonstrates our ongoing commitment to prosecute fraud that corrupts the competitive process," said Deborah A. Garza, Acting Assistant Attorney General in charge of the Department's Antitrust Division.

This is the 10th plea agreement to arise from an ongoing investigation into the military restraints industry. Military restraints are used to secure vehicles, aircraft, munitions, shipping containers and other specialized military cargo requirement for land, sea and air transportation.

Thomas Cunningham and Richard Barko, executives of a Pennsylvania supplier of military goods, pled guilty to rigging bids on U.S. Navy contracts for metal sling hoist assemblies. In September 2008, they were sentenced to pay criminal fines of $10,000 each.

In August 2008, Peck & Hale, a Long Island defense firm, was sentenced to pay a $275,000 criminal fine for bid-rigging.

In June 2008, Frank Granizo, the former president of a freight forwarding company, pleaded guilty to honest services wire fraud. Granizo is scheduled to be sentenced on Jan. 9, 2009.

Three Peck & Hale employees also have pleaded guilty in this matter. Wilson Freire, a former government contracts manager, pleaded guilty in May 2008 to one count of bid rigging and one count of conspiracy to accept kickbacks.

Freire is scheduled to be sentenced Feb. 27, 2009. In April 2008, Ransom Soper III, a former sales employee, pleaded guilty to one count of bid rigging and one count of conspiracy to commit wire fraud. Soper is scheduled to be sentenced Jan. 16, 2009.

In July 2007, a former sales director, Robert Fishetti, pleaded guilty to two counts of bid rigging. Fishetti also pleaded guilty to soliciting and accepting a kickback from another lower-tiered sub-contractor in return for favorable treatment in the award of subcontracts for finishing work on products supplied to the U.S. Department of Defense (DOD). In September 2008, he was sentenced to pay a criminal fine in the amount of $10,000 and to serve one year and two months of house arrest.

Certified Slings & Supply Inc., a Florida defense firm, pleaded guilty to one count of bid rigging and was sentenced in May 2008 to pay a $150,000 criminal fine. Roger Jacobi, the owner and president of a New York supplier of military goods, also pleaded guilty to one count of bid rigging and in April 2008 was sentenced to pay a $20,000 criminal fine.

Zhu is charged with conspiracy to commit wire fraud, which carries a maximum sentence of 20 years of imprisonment and a fine of $250,000. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

EXXONMOBIL TO PAY PENALTY FOR VIOLATING AGREEMENT

ExxonMobil will pay nearly $6.1 million in civil penalties for violating the terms of a 2005 court-approved Clean Air Act agreement.

The 2005 settlement already required ExxonMobil to pay a $7.7 million civil penalty, perform an additional $6.7 million in supplemental environmental projects in communities around the company's refineries, and install pollution controls at six of its U.S. refineries.

"The 2005 settlement has already resulted in major reductions in air emissions from the company's refineries, but we need full compliance to realize all the benefits of the settlement," said Granta Y. Nakayama, assistant administrator for EPA's Office of Enforcement and Compliance Assurance. "EPA will continue to enforce against companies that fail to comply with the terms of court-approved settlements."

The agreement penalizes ExxonMobil for failing to comply with the 2005 settlement at four refineries in Beaumont and Baytown, Texas; Torrance, Calif.; and Baton Rouge, La. Most of the penalties are for failure to monitor and control the sulfur content in certain fuel gas streams burned in refinery furnaces, as required by the 2005 settlement and EPA regulations. The other two refineries covered under the 2005 settlement are located in Joliet, Ill. and Billings, Mont.

Between approximately 2005 and 2007, ExxonMobil did not monitor the sulfur content in some fuel gas streams and subsequent testing revealed sulfur content in excess of EPA limits. The burning of sulfur-containing gases emits sulfur dioxide, which can cause serious respiratory problems.

The 2005 settlement and this penalty settlement with ExxonMobil were reached as part of a broader EPA initiative to reduce air pollution from refineries nationwide.

To date, 95 refineries located in 28 states, representing more than 86 percent of the nation's refining capacity, have been required to install new controls to significantly reduce emissions.

MEDICAL CLINIC OWNER PLEADS GUILTY TO ROLE IN $5.3 MILLION MEDICARE FRAUD SCHEME

The owner and operator of two Miami medical clinics has pled guilty to defrauding the Medicare program in connection with a $5.3 million HIV infusion fraud scheme.

Orlando Pascual Jr., 43, pleaded guilty on Jan. 7, 2009, to conspiracy to commit healthcare fraud before U.S. District Judge Ursula Ungaro.

In his plea, Pascual admitted that he co-owned two Miami clinics named Medcore Group LLC (Medcore) and M&P Group of South Florida Inc. (M&P) that purported to specialize in the treatment of HIV-positive patients. Pascual admitted that beginning in August 2004 and continuing through November 2006 he conspired with others to submit approximately $5.3 million in fraudulent claims to Medicare.

Pascual also pled guilty to two separate schemes to launder the proceeds of the health care fraud.

During the plea, Pascual admitted that Medcore and M&P were operated for the purpose of defrauding Medicare, that the treatments for infused or injected drugs were not medically necessary, and that he and others paid cash kickbacks to the patients for every visit to the clinic.

To obtain all the cash necessary to pay the patients, Pascual stated that he and others would write checks that appeared legitimate to people who would cash the checks and then return the cash to them for a fee.

Pascual acknowledged that most patients were HIV-positive or were given false diagnoses of cancer. He stated during the plea that he and others used physicians, a physician's assistant and phlebotomists to help facilitate the scheme.

In addition, Pascual acknowledged that clinic employees intentionally manipulated patients' blood samples so that they would appear to need treatment, when in fact they did not. Pascual stated that such tampering was done to make the medical files appear legitimate.

Pascual is currently incarcerated for Medicare fraud involving the operation of a durable medical equipment (DME) company in Miami from 2001 to 2003. Sentencing in this case is scheduled for April 3, 2009.

Seven co-defendants in the case are scheduled for trial beginning February 9, 2009.

FORMER GEN RE CHIEF EXECUTIVE OFFICER SENTENCED FOR ROLE IN FRAUDULENT MANIPULATION SCHEME

The former chief executive officer of General Re Corporation was sentenced last week for his role in a fraudulent scheme to manipulate AIG's financial statements.

Ronald E. Ferguson, 66, of Fairfield, Conn., Gen Re's chief executive officer from approximately 1987 through September 2001, was sentenced to two years in prison after being convicted by a federal jury on Feb. 25, 2008, on charges of conspiracy, securities fraud, false statements to the U.S. Securities and Exchange Commission (SEC) and mail fraud. In addition, Ferguson was sentenced by U.S. District Judge Christopher F. Droney to two years of supervised release following his prison term and a fine of $200,000.

Evidence presented at trial proved that Ferguson and his co-defendants, Elizabeth A. Monrad, Robert D. Graham and Christopher P. Garand, all former Gen Re executive officers, and Christian M. Milton, a former senior AIG executive officer, engaged in a scheme to falsely inflate AIG's reported loss reserves, a key indicator of financial health to insurance industry analysts and investors.

According to trial evidence, the fraud was carried out through the use of two sham reinsurance transactions between subsidiaries of AIG and Gen Re in response to analysts' criticism of a $59 million decrease in AIG's loss reserves for the third quarter of 2000.

The two sham transactions, evidence showed, increased AIG's loss reserves by $250 million in the fourth quarter of 2000 and $250 million in the first quarter of 2001, masking a declining trend in loss reserves in the face of premium growth. AIG restated the transactions at issue in filings with the SEC in May 2005.

Evidence presented at trial established that when the investigation was disclosed to investors by AIG and through various media outlets between Feb. 14 and March 14, 2005, shares of AIG stock dropped from $73.12 to $61.92. All five defendants were convicted on all counts against them presented in the 16-count superseding indictment.

Subsequently, on Oct. 31, 2008, the court found that AIG's shareholders lost between $544 million and $597 million as a consequence of the defendants' fraudulent scheme.

According to evidence at trial, each of the defendants knew that the true purpose of the transactions was to permit AIG to falsely report increasing loss reserves in its statements to analysts, investors and in its SEC filings. The defendants structured a sham reinsurance transaction and created a phony paper trail to make it appear as though Gen Re had solicited reinsurance from AIG when the evidence demonstrated that the parties knew AIG wanted the transaction to manipulate its financial statements.

Additionally, the defendants entered into a secret side deal whereby AIG would never have to pay any losses under the contracts; AIG would return to Gen Re the $10 million in premiums Gen Re paid to AIG and AIG paid Gen Re a $5 million fee for entering into the transaction.

FORMER EXECUTIVE AT CALIFORNIA VALVE COMPANY PLEADS GUILTY TO FOREIGN BRIBERY

A former executive of an Orange County, Calif.-based valve company pled guilty last week in connection with his role in a conspiracy to pay approximately $1 million in bribes to numerous foreign government officials.

Mario Covino, 44, an Italian citizen and resident of Irvine, California pled guilty before U.S. District Judge James V. Selna in Santa Ana, California to a one-count information charging him with conspiring to make corrupt payments to foreign government officials for the purpose of securing business for the Orange County valve company from state-owned enterprises in several countries, including Brazil, China, India, Korea, Malaysia and the United Arab Emirates (UAE), in violation of the Foreign Corrupt Practices Act (FCPA).

Federal officials alleged that the valve company designed and manufactured service control valves for use in the nuclear, oil and gas, and power generation industries worldwide. Covino was the director of worldwide factory sales at the valve company from March 2003 through August 2007.

In this position, Covino was responsible for overseeing new construction projects and the replacement of existing valves made by other companies and installed at customer plants in more than 30 countries.

In connection with his guilty plea, Covino admitted that from March 2003 through August 2007, he caused employees and agents of the valve

company to make corrupt payments totaling approximately $1 million to foreign officials employed at state-owned enterprises in order to assist in obtaining and retaining business for the valve company.

Covino also admitted that the valve company earned approximately $5 million in profits from the contracts it obtained as a result of these corrupt payments.

The corrupt payments were made to foreign officials at state-owned entities including, but not limited to, Petrobras (Brazil), Dingzhou Power (China), Datang Power (China), China Petroleum, China Resources Power, China National Offshore Oil Company, PetroChina, Maharashtra State Electricity Board (India), KHNP (Korea), Petronas (Malaysia), Dolphin Energy (UAE) and Abu Dhabi Company for Oil Operations (UAE).

Covino also admitted to providing false and misleading responses to internal auditors during a 2004 internal audit of the company's commission payments, and to deleting emails and instructing others to delete emails that referred to corrupt payments, for the purpose of obstructing the internal audit.

As part of his plea agreement, Covino has agreed to cooperate with the Department in its ongoing investigation. At sentencing, scheduled for July 20, 2009, Covino faces a maximum of five years in prison.

OSHA FINES CINTAS $3 MILLION FOR WORKER DEATH

Occupational Safety and Health Administration (OSHA) has reached an agreement with Cintas Inc. that the company will pay almost $3 million in penalties to resolve six cases currently pending before the Occupational Safety and Health Review Commission.

All of the cases involve citations OSHA issued to Cintas for failing to lock out hazardous energy sources on industrial laundry equipment while employees were servicing the equipment.

One case arose from OSHA's investigation of a fatal accident in which an employee fell into a dryer while attempting to correct a jammed conveyor.

Under the agreement, Cintas will pay 90 percent of the amount originally proposed, and make substantial safety and health enhancements at all of its commercial laundry facilities regulated by federal OSHA.

The agreement also requires Cintas to certify that it has implemented immediate interim measures to protect employees working in the wash areas at these Cintas facilities.

The company will retain a team of independent experts, including an auditor who will ensure that the interim controls are effective; an expert in hazard analysis and controls who will review Cintas facilities and recommend permanent controls; and additional experts who will review Cintas' safety and health management systems to recommend improvements to those systems.

Those improvements will include hiring additional professional safety and health staff, conducting more frequent internal safety inspections, establishing new systems to examine safety and health complaints and accident trends, and providing increased training to Cintas management and employees. OSHA will continue to inspect Cintas facilities and will enforce the terms of this settlement agreement.

MASS DROPS BIG DIG MANSLAUGHTER CASE

Massachusetts Attorney General Martha Coakley last month dropped criminal manslaughter charges against Powers Fasteners in connection with the July 2006 Big Dig ceiling collapse.

Powers is the Brewster, NY-based company that marketed and distributed the epoxy anchor bolt system used in portions of the I-90 Connector Tunnel.

Powers has agreed to enter into a deferred prosecution agreement and a Corporate Compliance Agreement to resolve the criminal indictment, and to pay the Commonwealth $16 million in civil damages.

Had Powers been convicted of manslaughter, the company would have faced a maximum penalty of a $1,000 fine, the Attorney General said.

"Our goal in this agreement was to reach a resolution of both the criminal and civil matters pending against Powers in a manner that best serves the Commonwealth," Coakley said. "By agreeing to comply with the terms of the deferred prosecution agreement and the compliance program, Powers is taking important steps to ensure that a similar incident will be prevented in the future. This is a far more meaningful outcome than a small monetary fine. In addition, the $16 million civil payment

serves as a deterrent, not only for Powers, but for other companies who work on public projects of this magnitude."

Powers was indicted by a Suffolk Grand Jury in August 2007 on one count of involuntary manslaughter in connection with the July 2006 death of Milena Del Valle, age 37, of Jamaica Plain.

Pursuant to the deferred prosecution agreement, the Commonwealth will file a conditional dismissal within 120 days provided that Powers meets certain conditions.

These conditions include that Powers enter into a corporate compliance agreement (CCA) and meet certain condition of the CCA. The indictment may be reinstated within three years if Powers breaches the CCA. The CCA includes the following requirements:

* Powers must immediately stop sales and production of Power-Fast Fast Set epoxy (Fast Set), the product used in the Interstate 90 connector tunnel.

* Powers must terminate all sales and production of all other adhesive anchors unless an accredited lab issues a report that the product complies with applicable technical standards and Powers uses commercially reasonable steps to obtain final approval from the appropriate regulatory agency.

* Powers must recall all of the Fast Set product currently in the field.

* Powers must publish warnings that Fast Set has failed certain tests and that slippage may be a sign of failure. It will also include the technical advisory issued by the Federal Highway Administration relative to Fast Set. Powers will also issue a notice to end users within 60 days.

* Powers must place a notice regarding Fast Set in two consecutive editions of all publications where Fast Set is reasonably believed to have been advertised.

* In addition to the reinstatement of the indictment, Powers will pay $100,000 per year if it materially breaches the CCA.

* Powers, with the approval of the Attorney General's Office, must hire an independent monitor to conduct an annual review of Powers' compliance with the CCA.

In addition to resolving the criminal indictment, Powers has also agreed to a resolution of all civil claims pending against the company.

In November 2006, the Attorney General's Office filed a lawsuit against Powers and other companies directly involved in the management, design, construction, and oversight of the Interstate 90 connector tunnel that collapsed in July 2006.

The lawsuit alleged negligence and breach of contract against the companies and was filed on behalf of the Commonwealth, the Massachusetts Highway Department and the Massachusetts Turnpike Authority. Powers has agreed to resolve claims asserted in this lawsuit with a payment of $16 million.

The majority of the payment – $15.5 million – will go to the Commonwealth's Transportation Infrastructure Fund.

The Fund is administered by the Commonwealth and is generally used to pay for Big Dig expenses and the costs of the Statewide Road and Bridge Program. The remaining $500,000 will go to the City of Boston to reimburse the city for costs incurred in the response to the ceiling collapse. In addition, Powers has also agreed that its products will not be qualified to be used on any state or locally publicly funded construction projects in Massachusetts until January 1, 2012.

Powers was indicted following a 13-month joint investigation by the Attorney General's Office, the U.S. Attorney's Office, the U.S. Department of Transportation Office of the Inspector General, the Federal Bureau of Investigation, and the National Transportation Safety Board.

During the course of this investigation, authorities learned that the epoxy anchor system marketed and distributed by Powers was used to suspend the concrete ceiling in the section of the Connector Tunnel where the collapse occurred. Investigators further determined that the cause of the ceiling collapse was the use of Power-Fast Fast Set epoxy product in the anchor system.

Specifically, the type of epoxy used was found to be unsuitable for sustained loads as it is susceptible to "creep"—a phenomenon whereby the anchors pull away from the ceiling over time. Investigators also believe that Powers was aware, and had been for a number of years, that its Fast Set product was unsuitable for sustained loads based upon the company's own "creep" testing.

The indictment followed, an investigation from which authorities alleged that Powers knew that its epoxy product was being used in the tunnel, and when provided with the opportunity, failed to differentiate to project managers between its Fast

Set and Standard Set products. Authorities further alleged that Powers failed to reveal this fact in either its marketing material, or when it was specifically asked.

Investigators alleged that Powers had the necessary knowledge and the opportunity to prevent the fatal ceiling collapse but failed to do so, and that this wanton or reckless conduct resulted in the death of Milena Del Valle.

SEIU, CALIFORNIA NURSES AT WAR OVER SINGLE PAYER

The SEIU and the California Nurses Association (CNA) are back at it again.

The two labor unions have been feuding – most recently last year over union organizing of health care and hospital workers in Ohio.

But the biggest feud is yet to come – over a single payer, Canadian style, public health insurance system.

The nurses are in favor.

But the SEIU says – not now.

"The next step in this process is not going to be a single payer national health care bill," SEIU President Andy Stern said in a conference call with reporters last week. "The outline that Barack Obama and Max Baucus have begun to flush out is where there is common ground. We're obviously part of many different coalitions, with the Business Roundtable, with AARP, and the National Federation of Independent Business. We can see a path forward. But the next step is not going to be for single payer. The next step is going to be building on the system we have, maintaining the employer based system, filling in the gaps of coverage, and beginning to focus on what America really needs to do besides coverage – which is prevention, technology, effective medicine – and in the long run – cutting the cost of health care, because this budget cannot sustain the continued increase in health care costs at the rates they have been."

Stern favors the Obama/Biden health care plan, which would create a public system to compete with the private insurance companies.

But CNA argues that if you keep the private insurance companies in the game, they will cherry pick the younger healthier customers, leaving the sicker, older population in the public system – making it unsustainable.

Stern says that doesn't have to be.

"The idea of a public system is a question of design," Stern said. "The design here is not to allow the insurance companies to cherry pick the best patients and leave the unhealthy ones in the public system. We are not talking about a catastrophic system for people who can't otherwise get covered. I think we're talking about an absolutely competitive system under the same rules and regulations to see if a public plan can be successful."

It can't be, says CNA's Chuck Idelson.

"Australia tried something similar and it didn't work. Any reform which leaves the insurance companies in charge of our health care system will not work," Idelson said. "How is the public system going to be able to financially compete with these multi-billion dollar corporations? Private companies will advertise and offer cheaper plans. They will be bare bones plans which offer minimal services with very high deductibles and other high out-of-pocket costs. Who will that appeal to? Younger, healthier patients. If you are older or sicker, you won't be able to use those plans because of the higher deductibles and limited coverage. As a result, the public system will be bankrupted and the private insurance companies will be making tons of money."

"There is no regulation which will effectively prevent the private insurance companies from cherry picking," Idelson said. 'No one is proposing regulating what they can charge. None of the proposals other than single payer reigns in price gouging and profiteering by the insurance industry."

"Insurance companies don't do what they do because they are evil," Idelson said. 'It is how they are set up. A lion doesn't eat zebras because the lion is evil. It's in the genetic make up of the lion. Same for insurance companies. They are not in business to provide care for people. They are in business to make profits for shareholders."

If in fact the Obama plan will bankrupt the public system, they why is Andy Stern supporting it?

"SEIU leadership has been very opportunistic and self promoting in its campaign on health care reform," Idelson said. "They have repeatedly formed alliances with companies like Wal-Mart – whose principle agenda is not repairing our health care system. The motives of SEIU in this campaign are at best questionable."

NOTABLE AND QUOTABLE

The federal investigation that prompted Gov. Bill Richardson of New Mexico to withdraw his nomination as commerce secretary offers a rare glimpse into a long-simmering investigation of possible bid-rigging, tax evasion and other wrongdoing throughout the municipal bond business.

Three federal agencies and a loose consortium of state attorneys general have for several years been gathering evidence of what appears to be collusion among the banks and other companies that have helped state and local governments take approximately $400 billion worth of municipal notes and bonds to market each year.

E-mail messages, taped phone conversations and other court documents suggest that companies did not engage in open competition for this lucrative business, but secretly divided it among themselves, imposing layers of excess cost on local governments, violating the federal rules for tax-exempt bonds and making questionable payments and campaign contributions to local officials who could steer them business. In some cases, they created exotic financial structures that blew up.

People with knowledge of the evidence say investigators are not just looking at a few bad apples, but also at the way an entire market has operated for years.

"It's rare to sell a Senate seat, but it's not rare to sell a bond deal," said Charles Anderson, who retired as manager of tax-exempt bond field operations for the Internal Revenue Service in 2007. "Pay-to-play in the municipal bond market is epidemic."

Michael D. Hausfeld, an antitrust lawyer in Washington, who is representing some of the cities, counties and states entangled in the federal dragnet, called it "one of the longest-running, most economically pervasive antitrust conspiracies ever to be uncovered in the U.S." Many of these municipalities say they did nothing wrong and were duped by financial firms, which they are suing.

The possibility of a vast web of collusion would be sobering in any case, but the issue is of particular concern now, as Congress and the incoming Obama administration prepare a big fiscal stimulus package that may spawn infrastructure projects carried out and financed at the state and local level. States and cities issue bonds to raise money to pay for things like schools and road construction, and are supposed to follow strict rules on how the proceeds are handled for investors to receive a tax exemption on the interest.

Mr. Anderson estimated that as much as $4 billion a year was vanishing into the system, based on the volume of problems he saw before retirement. . .

– Nationwide Inquiry on Bids for Municipal Bonds, by Mary Williams Walsh, New York Times, January 9, 2009

The Justice Department has reached more than a dozen business-related settlements since the presidential election, with more in the pipeline for January, prompting lawyers and interest groups to assert that companies are seeking more favorable terms before the new administration arrives.

The climate for business settlements could grow more harsh when Obama appointees seize the reins at the Justice Department, corporate lawyers say. They point to statements by Attorney General-designate Eric H. Holder Jr., who told an audience last month that he would expand the focus of federal prosecutors into corporate suites.

A review of 15 agreements involving corporations since early November suggests that much of the alleged misconduct dates back five years or more, provoking questions about why the cases took so long to mature and why resolutions are coming with only weeks left in President Bush's term.

"What they obviously are trying to do is take advantage of an administration that's deemed to be more friendly to business," said Cono R. Namorato, a Washington defense lawyer who ran the Internal Revenue Service's office of professional responsibility earlier in the Bush administration. "I know of no tax reason for doing it now."

Justice Department officials said there is nothing unusual about end-of-year settlements. They defend their record in investigating and prosecuting corporate misdeeds. In recent weeks, they announced indictments against five Blackwater Worldwide security guards for their role in a 2007 ambush that killed or injured 34 Iraqi civilians. Justice Department officials also rolled out their second-largest price-fixing settlement, a $585 million penalty shared by three companies that make high-tech liquid crystal display panels for computer monitors, televisions and cellphones.

"The department makes its enforcement

decisions based solely on the facts and the law, after conducting a thorough investigation," spokesman Peter Carr said. "A look at previous months and years show a steady stream of cases that have been resolved by settlement or plea agreement. While the department reaches these kinds of agreements throughout the year, it's not unusual for parties to resolve enforcement matters by the end of the calendar year." . . .

– End of the Year Brings a Burst of Settlements with the Justice Department, by Carrie Johnson, the Washington Post, January 2, 2009

IN BRIEF

DECEMBER 30, 2008

Ben-Ami Kadish pled guilty to a one-count information charging him with participating in a conspiracy to act as an unregistered agent of the Government of Israel.

Kadish is a former employee of the U.S. Army's Armament Research, Development, and Engineering Center at the Picatinny Arsenal in Dover, New Jersey.

On numerous occasions from about 1980 through 1985, Kadish provided classified documents relating to the U.S. military – including some relating to U.S. missile defense systems – to an agent of the Government of Israel, Yossi Yagur, who photographed the documents at Kadish's residence.

Kadish, 85, faces a maximum sentence of five years in prison and a maximum fine of $250,000.

Kadish is scheduled to be sentenced in Manhattan federal court by U.S. District Judge William H. Pauley on February 13, 2009.

INTERVIEW WITH JIM WALDEN, PARTNER, GIBSON DUNN & CRUTCHER, NEW YORK, NEW YORK

The Antitrust Division has set down some clear rules of the road when it comes to prosecuting antitrust crimes. One rule – first in the door and you get amnesty.

Jim Walden thinks that these rules have a lot to offer the Justice Department when it comes to prosecuting foreign bribery and other corporate crimes.

Walden is a partner at Gibson Dunn & Crutcher in New York City.

We interviewed Walden on January 8, 2009.

CCR: You graduated from Temple University Law School in 1991. What have you been doing since?
WALDEN: I joined O'Melveny & Myers as a first year associate, knowing that I was going to be clerking for Judge John Sirica a year later. So, I left O'Melveny after my first year. I clerked in the Third Circuit and then rejoined O'Melveny for a brief period of time while my applications were pending for an Assistant U.S. Attorney position. I was fortunate enough to get that position in the U.S. Attorney's office in the Eastern District of New York. It was at the very top of my list. I started there in December 1993.

I was there for about nine years. I left in June 2002. I went back to O'Melveny. I rejoined the firm as a partner. I spent about three and a half years there.

I was planning to make a transition to Philadelphia. But I happened upon Gibson Dunn and Crutcher. I hit it off with the partners here. I loved the place so much that I decided to stay here.
CCR: What's your practice like there?
WALDEN: Fraud generally – often health care fraud. We do some False Claims Act work, bribery cases under the FCPA, and we handle a significant amount of antitrust work. I also do a significant amount of work in the pro bono area. I have been very active. I've had some of my proudest accomplishment in the pro bono field.
CCR: Because of the Madoff case among others, there's a lot of public anger now over white collar and corporate crime. How is that translating into policy?
WALDEN: There has been and there will continue to be an uptick in white collar prosecutions, in part

because of the political imperative and in part because of the reality. The reality is that however many people may resort to graft or corrupt practices in order to earn a buck, it's probably true to say that more people will turn to those devices in order to preserve a buck. Whether it's Madoff or other cases like it, I assume we will be seeing more people in desperate circumstances turning to illegal activity. And there is obviously an important public policy goal to try and rid our markets of that kind of activity.

CCR: Will the Obama administration bring change to corporate crime prosecutions? Or is this field immune from politics?

WALDEN: My experience at the U.S. Attorney's office was completely apolitical. Prosecutors were given significant discretion – appropriately so – to decide what to do with their cases.

And they exercised that discretion properly. Despite the problems at Main Justice, it's my perception that the U.S. Attorneys offices here have remained apolitical and call the cases right down the middle.

The trend that I've seen in many different areas has been toward higher fines and longer prison sentences. I understand the public policy reasons for that. And they are important. But they need to be balanced. And I believe this administration will balance the important public policy goals with the goals of more transparency and more uniformity when it comes to corporations who self-report criminal activity and who render significant assistance. We have seen a lot of subjectivity in that area, and a lack of transparency in a way that I don't think is good for the government or for corporations.

Most of the people at the top of corporations, when they understand the rules, will implement programs to make sure they try to stay within those rules. And the rules I'm talking about here are the rules governing cooperation once the investigation has begun. If there is more transparency and uniformity in terms of the benefits of self-reporting, you will see increased compliance.

If the rules provide for more uniformity and more predictability in terms of what the corporation will get for cooperation, you will see more corporations rendering the kind of assistance that say for example Debevoise & Plimpton rendered in the Siemens case. From all accounts, the cooperation there was extraordinary.

CCR: Eric Holder is the incoming Attorney General. When he was with the Justice Department under President Clinton, Holder wrote the original memo on prosecution of corporations. The result of the Holder memo and its successors has been an uptick in deferred and non prosecution agreements.

WALDEN: It's not that corporations used to be charged left and right, and now they are getting deferred and non prosecution agreements. Rather, for many years it was common practice to achieve civil settlements with companies. Or to achieve settlements with individuals and not charge companies. The explosion we are seeing is not a shifting of hard prosecution at the corporate level to non prosecution.

Rather, it's increased enforcement against the corporations which usually carries some period of scrutiny and monitoring by the federal government, significant changes to certain policies and procedures, and significant payments by the companies.

I don't think anyone is going to disrupt that trend. The benefits of prosecuting rogue companies are real and substantial. And they need to be in the back of every prosecutor's mind. But the collateral consequences to people who are completely innocent of the fraud are also extremely important for prosecutors to consider – whether those consequences are going to extend to innocent employees, shareholders, customers, suppliers.

You can achieve better results, and in many circumstances a stronger corporate environment, through deferred and non prosecution agreements that allow for disgorgement for wrongly obtained profits and increased monitoring, including independent monitoring by third parties in appropriate cases.

Take the FCPA for example. The Justice Department has taken a page out of the playbook of the Antitrust Division. They are now asking for more money from companies, even those that cooperate. And they are advocating longer prison sentences. But I would like to see them partner with the law firms representing the companies to develop all of the evidence as quickly as possible, rewarding the company for that in a way that is measured and appropriate. But then using that information as aggressively as possible against the wrongdoers, in cooperation with outside counsel.

CCR: You mentioned the Antitrust Division. It has a detailed formal amnesty program that has been

quite successful. So, are you saying that a similar kind of formal program is needed for the Foreign Corrupt Practices Act?

WALDEN: More formality and uniformity will be beneficial to the entire Criminal Division – not just in the FCPA area. The Antitrust Division's program, developed in 1993 to great fanfare, in many ways was a watershed event in law enforcement history. The antitrust laws were not being effectively enforced from a criminal perspective before that. There was a high degree of animosity and friction between the defense bar and the Antitrust Division. And that really changed in a fundamental way in the aftermath of the initial leniency program in 1993. It's success is unparalleled. The increase in fines is staggering. And some of the things they have been able to accomplish in terms of changing the culture are remarkable. That's not to say that there are not antitrust violations occurring as you and I are speaking now. Of course, there are. The marine hose case is just one example.

However, the Antitrust Division has benefitted greatly from the trust they have placed in companies that hire counsel to do thorough investigations. And there is a high degree of transparency for what is going to happen with the company. The same thing could be applied to a corporation in other areas. And in some ways, it could dovetail with the contentious issue of attorney client privilege. If a corporation understood that all of this was voluntary and they understood what they would get from volunteering certain information – that would be a good first step in designing a program.

A company conducts a thorough investigation within a short period of time and that period of time would have to depend on the complexity of the case. Let's say the initial report is due within 90 days of the initial contact with law enforcement. And let's say there is a belief that that initial report is a thorough and honest attempt by the company to find the wrongdoing and substantially advance the investigation. At that moment, there is nothing stopping the prosecutor from advocating for a non prosecution or deferred prosecution agreement that carries with it the obligation of ongoing cooperation.

And then there is the possibility of some sort of common interest agreement that would allow the company to share work product with the prosecuting authority in a way that wouldn't constitute a waiver of the attorney client privilege with respect to third parties.

Those are the kinds of things that I'm thinking through. People at the top of corporations are extremely smart and mindful of trying to abide by rules. And when those rules deal with corporate cooperation, the government will get more, and we will all get more by increasing transparency and uniformity.

CCR: Under the antitrust amnesty program, first company in the door to blow the whistle on the other companies in the antitrust conspiracy gets amnesty. You really don't have those kinds of conspiracies in the FCPA area.

WALDEN: That's true. And certainly there would have to be variations. But that's not to say there couldn't be a set of rules that provide transparency and some uniformity concerning when a corporation gets a non prosecution, or a deferred prosecution – or when it is required to pay a civil settlement. Right now those decisions are made on a case by case basis and subject to very little consistency. I don't believe that serves the government or companies very well.

And so, while you couldn't model it directly on the antitrust model, you could take a page from that playbook and devise a system that provides for greater transparency and uniformity and gives companies a set of rules that they can apply so that they know – if we hire a law firm, and we can accelerate this investigation, and we can get the initial phase of it done within let's say 90 days, and the government determines we have substantially moved forward the investigation, we will qualify for consideration of a non pros agreement instead of a deferred pros agreement.

Are there going to be problems? Yes. Complexities? Of course. Will it need lots of bright minds getting together trying to figure out how to resolve those complexities? Of course. But it is extremely worth while. And I hope that is a direction the new administration is willing to consider.

CCR: How does your practice break down – individual versus corporate clients?

WALDEN: It has changed over time. For the first two or three years, it was 80 percent companies and 20 percent individuals. Maybe it shifted to 60 companies, 40 individuals. It has always been a majority of corporate representation.

CCR: There seems to be a consensus in the white collar bar that its more important to move against

the individuals and less important to move against the corporate entity.

WALDEN: I'm not sure you can say that across the board without regard to the context. Look at the Computer Associates case. Obviously, in that case there was a fraud there.

CCR: Were you involved with that case?

WALDEN: I did represent the individual who first came forward to expose the obstruction of the government investigation.

CCR: What was his name?

WALDEN: Lloyd Silverstein.

You were dealing with a systematic fraud. The fraud had an aspect to it that was the creation of revenue. But for the most part it was the moving of revenue from one quarter to another. And that obviously is quite serious – but not as serious where 90 percent of a company's revenue is just completely made up.

There was an appropriate view inside the office that it needed to be taken very seriously. And it was taken seriously. But the more serious part of it was the company obstructed justice in many different ways, including from the very top. One could fairly conclude that a company that engaged in that kind of activity was quite deserving of corporate prosecution.

CCR: And they were criminally prosecuted, right?

WALDEN: The company got the benefit of a deferred prosecution agreement.

CCR: Do you disagree with that judgment?

WALDEN: The outside attorney handling the case in the first instance had no idea of the obstruction. The audit committee then hired a second team of lawyers. After the obstruction was exposed, the lawyers helped the government develop a significant case and brought the company through. But I don't think that was an easy decision for them to reach because of the kind of conduct at issue.

So, there should a be a general rule that where the company is cooperating in good faith, the company should get the benefit of a non pros or a deferred pros agreement to avoid the collateral consequences.

It becomes a closer call where the corruption goes to the top of the company and the corruption is coupled with obstruction of justice, or if a significant portion of the company was involved with actual wrongdoing.

With that in mind, there should be a formal set of rules with discretion built in, to help corporations navigate the landscape and design more effective compliance programs.

CCR: In the Computer Associates case, you would come down how?

WALDEN: In my mind, these types of cases fall into two categories. Cases in which there should be a general rule in favor of non prosecution. And then cases where at a minimum there should be a deferred prosecution and if anything there should be a presumption of a prosecution that is only counterbalanced by overwhelmingly significant cooperation.

In Computer Associates, there was pervasive fraud married with obstruction. So, it would fall in the category where there should be a presumption of a prosecution. I wasn't the prosecutor who handled the prosecution. But I understand that the cooperation after the obstruction was exposed was extraordinary. So, I can't quibble with their substantial settlement, which included a significant financial penalty with a deferred prosecution agreement. Although, it was a very close call.

CCR: Obama has nominated Mary Schapiro, the head of FINRA, to be the new head of the SEC. Steve Pearlstein in the *Washington Post* today wrote this about Schapiro: "The problem is that there is nothing in her record to suggest that she is likely to clean house at the agency and launch a brutal and sustained assault on Wall Street culture."

WALDEN: There is an increasing impact of politics on prosecutorial decisions. We have to be mindful when we ask for tough enforcement. We should enforce the law, not as a political objective, but rather to catch criminals. You can go out there and say – I'm going to assault Wall Street. And when you do that, you will necessarily rope in people who shouldn't be charged because they didn't violate the law, or they engaged in a technical violation. And with technical violations, the sound use of prosecutorial discretion in a normal environment would counsel against prosecuting them.

In some areas, there has been an erosion in those standards. The increasing emphasis on the political goal of restoring confidence in the markets impacts the discretion prosecutors use in deciding whether a particular individual in a particular circumstance should be charged.

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