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— INDUSTRY INSIGHT —

Totally wired

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EXECUTIVE SUMMARY

- More than 18,000 conversations were recorded to uncover an insider-trading ring headed by Galleon Group's Raj Rajaratnam.
- Evidence gained from wiretaps sought by the DOJ may later be obtained by the SEC to bring civil enforcement actions.
- The DOJ and the SEC may find themselves in an uphill enforcement position when seeking prosecutions without taped conversations.

For many years, lawyers have advised clients to be careful about writings. The typical advice: "Don't fire off a thoughtless e-mail or text. Pick up the telephone instead." Today, the "avoid thoughtless writings" advice remains true, but the phone call is no longer sacrosanct.

Gone are the days when wiretaps were used only for prosecuting large scale, violent crimes. Indeed, more than 18,000 conversations were recorded by government agents uncovering an insider-trading ring headed by Galleon Group hedge fund manager Raj Rajaratnam. The investigation has ensnared executives, private equity funds, board members, an analyst, an investor and an investor relations consultant, just to name a few. The government simply bundled securities fraud claims with wire fraud and money-laundering allegations to obtain wiretaps for the investigation -- privacy be damned.

With the government's "get tough" enforcement agenda in the wake of the financial crisis and the expansion of its powers under the Dodd-Frank Act, the use of wiretaps will now be a real factor in the investigation of businesses and securities industry players. While the Securities and Exchange Commission does not have independent authority to seek wiretaps, the Department of Justice and the SEC have announced enhanced cooperation between their agencies. Now evidence gained from wiretaps sought by the DOJ may later be obtained by the SEC to bring civil enforcement actions.

This is not to say that every suspected financial fraud will immediately result in tapped telephones. The government still faces a significant obstacle to employing such techniques: Wiretaps are expensive. On average, a wiretap investigation costs \$52,200 -- no small undertaking in an environment of belt-tightening and budget woes. Moreover, even with sufficient funds, the government must still convince a judge that there is probable cause to believe that (1) a particular criminal offense is being committed, and (2) communications concerning that offense will be obtained through interception.

Despite the cost and proof burden, the DOJ and the SEC may find themselves in an uphill enforcement position when seeking prosecutions without taped conversations. The media frenzy over the Galleon investigation has changed the public's awareness. Insider trading is historically difficult to prove. Authorities frequently rely on circumstantial evidence to show method and opportunity, such as the suspicious timing of trades, the demonstration of relationships, calendar entries and phone logs. Just as prosecutors often lament that television dramas such as "CSI" have made prosecuting cases without DNA evidence difficult, jurors seated for a white-collar trial may now expect to be provided with evidence of recorded conversations.

It is worth noting that the technology behind wiretapping has evolved considerably. Many telephone exchanges have been converted from mechanical to digital technology, allowing taps to be implemented remotely by computer -- even for landline phones. For a digital tap, the computer simply copies the digitized bit, and it is impossible to tell whether the line is being monitored (for example, no unusual clicks or static). The government may also seek a warrant that will turn a cellphone's internal microphone into a "roving bug," which is capable of monitoring activities (including conversations and location) even while the phone is not being used for a call. Only removal of the cellphone battery deactivates the roving bug. The technology is also available to tap Internet calls (including voice over Internet protocol). Interestingly, encrypted communications with peer-to-peer technology, such as Skype, may currently be unable to comply with a wiretap order.

While the Justice Department considers how aggressively it will use wiretaps, executives and professionals in the securities industry should spend a moment reflecting on their telephone practices. Note that merely conducting yourself as a law-abiding individual will not guarantee prevention from ensnarement in an investigation. For example, while you may not be a target, a client, a vendor, a contractor, a broker, an investment banker, a family member or a friend may have a tapped phone. While legal hurdles and limited resources will prevent wiretaps from becoming truly commonplace, a few simple practices for telephone usage offer the safest approach.

Be thoughtful; pause and use common sense when speaking. A transcribed call becomes as permanent as an e-mail, text or letter. Be as attentive about the spoken word on the telephone as you would be about the written text in an e-mail or letter. Likewise, it is a good practice to avoid making flippant comments or jokes about potentially serious issues. This gives rise to the second rule.

Sometimes it is better to keep quiet. If a delicate issue arises during a call, if practicable, consider deferring the topic until an in-person meeting can be arranged. If your statements could be misconstrued when transcribed, the telephone is not the place to make them. Keep in mind that once your statements are recorded and deemed admissible in court, those statements can be transcribed or played back again and again in court. Defense counsel cannot cross-examine a recorded voice.

In the event you believe that your calls are actually being monitored, there are additional measures you can take to limit the surveillance. The Wiretap Act requires the government to "minimize the interception of communications" that are not subject to the authorization granted to the government to monitor conversations. In practice, this means the government agent must stop the interception or use screening methods when it becomes clear that a tapped call is outside the scope and subject matter of the warrant. For example, if the warrant concerns your business dealings in China, other aspects of your business or personal affairs would not be within the scope of the warrant. Nor can the government monitor privileged conversations, including the spousal, doctor-patient, attorney-client and priest-penitent privileges. Accordingly, if it is apparent to the investigator that the call is either outside the scope of the warrant or privileged, the investigator should temporarily terminate the interception.

State the name of the other party and the call's purpose at the outset. As there is no way to know the scope of the warrant, this practice must be utilized regularly to be effective. While somewhat burdensome, providing this information does not need to sound overly awkward. In fact, you probably do it all the time. Examples: "Dr. Smith, I'm calling because I strained my knee again." "Hi, Ben. Are the financial projections ready yet?" Simply save the small talk or humorous story until later in the conversation, and lead with the purpose of the call.

The significant media coverage of the government's efforts to investigate businesses and professionals is no accident. In the name of deterrence, the government wants the public to see photos of executives being led out in handcuffs and headlines of large-scale sting operations conducted blue-collar style. Accordingly, corporate America and professionals in the securities industry should be on the alert and take precautions because an ordinary two-way call may actually be a party line with a government agent.

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