

Wiretap Rules Could Complicate White Collar Defense

By **Evan Weinberger**

Law360, New York (September 29, 2010) -- With the Obama administration reportedly pushing to get the authority to wiretap previously ineligible communications devices, the impact on the white collar world is likely to be limited, attorneys say, though hardly headache-free.

According to a report Monday in the New York Times, the Obama administration will present a bill to Congress early next year that would require all online communications services to have the technical capacity to comply with a wiretap order. The bill would include e-mail providers, mobile devices such as Research In Motion Ltd.'s BlackBerry smartphones and social networking sites such as Facebook.

The Times report said administration officials are concerned that potential terrorists and drug gangs are increasingly using Internet-based technology and peer-to-peer connections, which are not subject to a 1994 wiretap statute, to plot their actions.

While such wiretap authority would provide real-time information in a terrorism case, where time is of the essence, its applicability may be limited in the white collar context, said Robert J. Anello, a principal with Morvillo Abramowitz Grand Iason Anello & Bohrer PC.

Wiretaps are not necessary in most white collar cases, including insider trading and other violations of securities laws, Anello said.

Since most violations are discovered after the fact, either by market surveillance tools tracking odd trading patterns or a witness coming forward with information, white collar defendants are often notified of an investigation and asked to provide documents, he said.

"The vast majority of white collar cases are not done without the knowledge of potential targets," Anello said.

The potential broadening of devices subject to wiretaps is also unlikely to change the fact that wiretaps are difficult to get, said Stanley A. Twardy Jr., a Day Pitney LLP partner who previously served as the U.S. attorney for the District of Connecticut.

“To be able to get a wiretap order, the government has to satisfy the court that normal types of investigative means wouldn't work,” Twardy said.

It would be far easier for a prosecutor or the FBI to argue that real-time information was necessary to stop a terrorist attack or drug deal than to argue that a company or stock trader was presenting a major threat to national security requiring contemporaneous information, he added.

Plus, most information the government would need is already potentially available via a subpoena, Anello said.

“Internet communications for many white collar cases, particularly in securities, are pretty much an open book because they're preserved and securities firms are required to save them,” Anello said. “So it's already out there.”

That isn't to say the presence of a wiretap does not open a whole host of issues for white collar defense attorneys.

“The white collar criminal defense lawyer's worst fears are candid communications” that reveal your client's motivations, said Robert W. Ray, a partner in the litigation group at Pryor Cashman LLP and a former independent counsel during the Clinton presidency.

“White collar cases are difficult to prove, and the best way to do that is to prove intent,” he added.

Wiretaps are not new to the white collar world and in fact are the subject of a heated battle in the case against Raj Rajaratnam and his Galleon hedge fund, according to Chris Clark, the co-head of the white collar criminal defense and investigation practice group at Dewey & LeBoeuf LLP.

Rajaratnam's defense counsel is vigorously challenging the use of those wiretaps, but Barry J. Mandel, the chair of Foley & Lardner LLP's securities enforcement and litigation practice, said whether they are admissible or not, they've already had a major effect.

“While that is a defense strategy and they can make a lot of noise about it, you can see that the existence of the tapes has enabled the government to achieve half a dozen guilty pleas, maybe more,” Mandel said of the Galleon case.

The mere presence of a wiretap can potentially spook other defendants in a case, which could simply compound the problems facing defense counsel, he added.

“Now you have a cooperating witness against you,” Mandel said.

On a practical level, the presence of wiretaps presents yet another huge stack of evidence to comb through, Twardy said. Increasing the number of potential devices subject to wiretaps would only increase that stack further.

But even worse for defense counsel, Clark added, is that wiretaps hand the government information without the knowledge of the defendant, making it harder to explain away. “That's a huge advantage to the government,” he said.

Although there have been instances where the tools to crack terrorism and organized crime cases could be used in the white collar context, most attorneys say it remains rare.

“This is something that would have to stay on defense counsel's radar screen that the government may be able to do this,” Mandel said.

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