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11th Circuit Nixes CPA's Claim That SEC Sanctions Preclude Criminal Prosecution

Article By John S. Yi
Stephen G. Stroup
Drinker Biddle & Reath LLPPublications

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On February 3, 2017, the United States Court of Appeals for the Eleventh Circuit rejected an accountant's argument that the imposition of both criminal charges and SEC sanctions on the basis of the same alleged conduct violated the Fifth Amendment's Double Jeopardy Clause. This appellate court ruling illustrates that defendants in SEC investigations and enforcement proceedings must be mindful that the imposition of civil penalties, disgorgement, and permanent bars do not preclude the prospect of criminal prosecution.

Thomas D. Melvin ("Melvin"), a certified public accountant, agreed in April 2013 to pay the SEC a civil penalty of $108,930 and disgorgement of $68,826 to settle alleged violations of Sections 10(b) and 14(e) of the Securities and Exchange Act of 1934 and Rules 10b-5 and 14e-3 thereunder. According to the SEC, Melvin purportedly had disclosed confidential insider information that he received from a client that pertained to the pending sale of a publicly traded company. A Rule 102(e) administrative proceeding in September 2015 also permanently barred Melvin from practicing before the SEC as an accountant. Exchange Act. Rel. No. 75844.

The Department of Justice instituted a parallel criminal proceeding against Melvin that involved the same alleged wrongful activity. Melvin moved to dismiss the eventual indictment on the ground that the collective sanctions the SEC had levied upon him constitutionally precluded a criminal prosecution under the Double Jeopardy Clause. After a federal district court denied his motion to dismiss, Melvin pleaded guilty to six counts of securities fraud pursuant to a written plea agreement. He then appealed the district court's denial of his motion to dismiss.

In *United States v. Melvin*, No. 16-12061 (11th Cir. Feb. 3, 2017), the Eleventh Circuit conducted two inquiries to determine whether the imposition of the civil penalty, disgorgement and professional debarment against Melvin were so punitive that they rose to the level of a criminal penalty. For the initial inquiry, the court found that Congress intended the sanctions imposed by the SEC to be a form of civil punishment because monetary penalties are expressly labeled as "civil penalties" and the legislative branch empowered the SEC to prohibit an individual from appearing or practicing before it.

As to the second inquiry, the circuit court examined seven "useful guideposts" articulated by the United States Supreme Court in *Hudson v. United States*, 118 S. Ct. 488, 493 (1997). These guideposts included whether:

1. the sanction involves an affirmative disability or restraint";
2. it has historically been regarded as a punishment";
3. it comes into play only on a finding of *scienter*";
4. its operation will promote the traditional aims of punishment—retribution and deterrence";
5. the behavior to which it applies is already a crime";
6. an alternative purpose to which it may rationally be connected is assignable for it"; and
7. it appears excessive in relation to the alternative purpose assigned."

Applying these guideposts, the Eleventh Circuit believed that the sanctions at issue "constitute no affirmative disability or restraint approaching imprisonment" and observed that "neither money penalties nor debarment have historically been viewed as punishment." It also noted that "penalties for security fraud serve other important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry." As such, the appellate court concluded that Melvin's criminal prosecution did not constitute a violation of the Double Jeopardy Clause.

This ruling is the most recent cautionary reminder that, even in this era of headline-grabbing civil penalties that far exceed those the SEC sought and obtained just a few years ago, defendants should never lose sight that the resolution of SEC charges does not preclude the prospect of a parallel criminal proceeding. Indeed, any time the SEC's prosecutorial theory is potentially fraud-based, defendants and their counsel must remain extremely cautious to the possible involvement of criminal authorities and develop their legal strategies accordingly.

The SEC's Form 1662 underscores this point. This form, which is provided to all persons requested to supply information voluntarily to the SEC or directed to do so via subpoena, states:

It is the policy of the Commission … that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him.

The disposition of an SEC proceeding also does not prevent the SEC from sharing any information it has accumulated with criminal authorities. Instead, as Form 1662 warns, the SEC "often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors" and there is "a likelihood" that the SEC will provide this information confidentially to these agencies "where appropriate."