

“Tapping” into Wall Street

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Confidential informants, undercover agents, and electronic surveillance—over the last few years, federal law enforcement officials have begun using tactics typically reserved for corruption and drug cases to combat white collar crimes including health care fraud, unlawful kickbacks, bank fraud, aggravated identity theft, computer crimes, and violations of the Foreign Corrupt Practices Act. As recently noted by Lanny Breuer, assistant attorney general of the Department of Justice’s Criminal Division, “[o]ut are the days of resting easy in the belief that only self-reporting or tipsters will bring criminality to light. In are the days of proactive and innovative white collar enforcement.” (Remarks to ABA Nat’l Inst. on White Collar Crime (Feb. 25, 2010), <http://tinyurl.com/7sgylsb>).

Though Wall Street once appeared immune to these “blue collar” tactics, the recent Galleon Group cases—the first Wall Street insider trading investigation where wiretaps were used—exemplify the shift in white collar investigative tactics. (See Gail Shifman, *Wall Street Meets “The Wire,”* WHITE COLLAR CRIME PROF BLOG (Oct. 19, 2009).) This “tactical sea change” in the manner of investigating financial malefactors has coincided with an enhanced focus on combating financial crime. (Abigail Field, *Sorry, Judge Rakoff: You Can’t Give the SEC the Galleon Wiretaps . . . Yet,* DAILY FIN. (Sept. 30, 2010), <http://tinyurl.com/7k8peas>.) In 2009, President Obama established the Financial Fraud Enforcement Task Force, which includes senior-level officials from more than 20 federal departments, agencies, and offices, and has as its express mandate the investigation and prosecution of significant financial crimes and other violations relating to the financial crisis. (See *What Is the Financial Fraud Enforcement Task Force?*, STOPFRAUD.GOV, <http://www.stopfraud.gov/about.html>.) One only has to pick up the paper to see that this mandate is being taken seriously.

White collar practitioners must, therefore, be prepared to contend with an increase in both the investigation and prosecution of financial crime, as well as the accompanying enhanced use of wiretap evidence. It is critical to understand the foundations of wiretap authority, the arguments available to defense counsel, and the potential impact of this evidence on white collar prosecutions. This article includes a brief primer on Title III, followed by a review of the key arguments made in the Galleon Group cases—arguments that exemplify how the procedural and evidentiary requirements of Title III provide defense counsel with ample room for creative pretrial lawyering. Also discussed are the practical considerations that defense counsel will need to take into account—preindictment through trial—as we enter this new era. Indeed, as these tactics often provide the government with direct or circumstantial evidence of a client’s mens rea—the element that typically provides counsel with the most fruitful grounds for strong negotiation, pretrial motions, and trial strategies—counsel may have to rethink their typical approaches to financial fraud cases.