The Conspiracy And FBAR Charges Against Manafort, Gates

By **Robert Adler**

Robert Adler

The indictment of Paul J. Manafort Jr. and Richard W. Gates, III by special counsel Robert Mueller, unsealed on Oct. 30, 2017, contains nine counts against Manafort and eight counts against Gates.

Count 1 charges both defendants under the general 18 U.S.C. §371 conspiracy charge. Count 1 utilizes both prongs of §371: (1) a "Klein conspiracy" to defraud the U.S. Department of Justice and the U.S. Treasury Department, and (2) a conspiracy to commit the offenses charged in counts 3 through 6 and 10 through 12 (discussed below). The Klein conspiracy charges alleges an attempt by Manafort and Gates, together with unnamed others, to impair, obstruct or defeat, by using dishonest means, the lawful function of those governmental departments. See, United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957). A Klein conspiracy charge is a favorite tool of prosecutors because it requires only evidence of an attempt to obstruct or impede the normal functions of a governmental agency, rather than requiring the prosecution to prove the more exacting evidence required to establish the elements of specific offenses identified in the second prong of §371. In either case, the evidence must be beyond a reasonable doubt.

Count 2 charges a separate conspiracy. This conspiracy is alleged to be one between Manafort, Gates and unnamed others to launder money. 18 U.S.C. §1956(h).

Counts 3 through 6 charge that Manafort willfully failed to file required Treasury Department information returns called "FBARs" (reports of foreign bank and financial accounts) for calendar years 2011-2014 that would have otherwise disclosed that he had financial interests in and/or authority over financial accounts in a foreign country. Gates was similarly charged in counts 7 through 9 with willfully failing to file FBARs, but only for calendar years 2011-2013.

For the time periods in question, the Treasury Department required the annual reporting of offshore accounts on or before June 30 of the following year. This authority derives from 31 U.S.C. §5314 under which the secretary of the treasury must require a United States resident or citizen to file reports of certain financial interests held in a foreign account. If the aggregate value of all foreign financial accounts exceeds $10,000 at any time during the calendar year, then full disclosure must be made of these accounts, including the maximum value of each account during the calendar year; the name of the financial institution; and the account number. The FBAR filing is an information return only — there is no tax payment.

For taxable years starting March 18, 2010, the IRS began to require a new Form 8938 (to be filed with the taxpayer's annual Form 1040) called a "Statement of Specified Foreign Financial Assets." This form would have required detailed disclosures by at least Manafort of his foreign financial accounts. The indictment identifies assets well above the minimum threshold which would trigger the annual filing requirement for this form. This requirement

is in addition to the annual FBAR return. The indictment does not indicate whether Manafort or Gates filed Forms 8938. There is no allegation that either willfully failed to file these forms.

A related statute, 31 U.S.C. § 5322(b), provides that a person who willfully violates the FBAR filing requirement may be charged with a felony with imprisonment for up to 10 years. In addition to this criminal penalty, 31 U.S.C. § 5321(a)(5) imposes a substantial civil penalty on any person willfully violating § 5314 (requiring the annual filing of an FBAR). The maximum penalty is the greater of $100,000 or 50 percent of the account balance at the time of the violation. If the failure is not "willful," the civil penalty is limited to $10,000. In any event, the statute (31 U.S.C. § 5321(a)(5)(B)(ii)) provides that there is no civil penalty if the violation was due to "reasonable cause." Even when the failure to file FBARs may be "willful" (and therefore potentially criminal), the government's usual approach is to assess civil penalties. FBAR indictments are uncommon as a result.

The charges against Manafort and Gates differ in significant respects from charges in similar cases where the government has charged a Klein conspiracy under §371 as well as a willful failure to file FBARs under 31 U.S.C. §§5314 and 5322. Other indictments have included the willful filing of a false tax return under Internal Revenue Code Section 7206(1). See, e.g., United States v. Kerr, 2012 WL 2919450 (D. Ariz. 2012); United States v. Simon, 2011 WL1304438 (N.D. Ind. S. Bend. Div 2011) and United States v. Quiel, 595 Fed. Appx. 692 (9th Cir. 2014).

Count 1 incorporates the introductory allegations that Manafort and Gates "funneled millions of dollars in payments into foreign nominee companies and bank accounts, opened by them and their accomplices in nominee names and in various foreign countries."[1] It further alleges that, in each of Manafort's tax filings for 2008 through 2014 (presumably referring to Schedule B of Manafort's Forms 1040s), he falsely represented that he did not have authority over any foreign bank accounts.[2] The indictment is silent as to whether Gates similarly made (alleged) false representations in his income tax returns. This difference raises the question whether Gates, unlike Manafort, did acknowledge in his own income tax returns that he had signature authority or control over one or more financial accounts in a foreign country. It appears, based on the indictment, that Gates did not make such acknowledgment in view of the indictment's assertion[3] that both Manafort and Gates "falsely and repeatedly report[ed] to their tax preparers and to the United States that they had no foreign bank accounts."

Much of the media coverage has overlooked the indictment's allegations[4] that the defendants misinformed their tax preparers that they had no foreign bank accounts and the more specific allegation[5] that Manafort and Gates "repeatedly and falsely represented in writing to Manafort's tax preparer that Manafort had no authority over foreign bank accounts." If the prosecution can establish these continuing false representations, it would undercut any realistic effort by Manafort and Gates to demonstrate that they were not aware that FBAR filings were required or that their tax return preparers failed to advise them that FBARs were required. If the tax return preparers were kept in the dark as to the foreign accounts, then Manafort and Gates cannot credibly be heard to argue that their tax return preparers failed to advise them to file FBARs. If the special counsel can establish that Manafort and Gates intentionally failed to inform their tax return preparers that they had authority over foreign accounts, Manafort and Gates will predictably encounter difficulties in prevailing on the FBAR charges.

Also noteworthy is what was not charged in the indictment:

- Neither Manafort nor Gates was charged with the willful filing of false tax returns under IRC §7206(1) despite the fact that the indictment asserts: (1) Manafort "used his hidden overseas wealth to enjoy a lavish lifestyle in the United States, without paying taxes on that income";[6] (2) "In order to use the money in the offshore nominee accounts without paying taxes on it MANAFORT and GATES caused millions of dollars in wire transfers from these accounts to be made for goods, services, and real estate";[7] (3) "[Manafort and Gates] did not report these transfers as income to DMP, DMI, or MANAFORT.";[8] (4) "MANAFORT did not report the money used to make these purchases on his 2012 tax return";[9] and (5) "in each of Manafort's tax filings for 2008 through 2014, he "represented falsely that he did not have authority over any foreign bank accounts."[10]

- Given these allegations, why Manafort and Gates were not charged with tax evasion under IRC §7206(1) is an open question.

- The indictment did not charge Manafort with bank fraud under 18 U.S.C. §1344. Under that criminal statute, bank fraud is chargeable against anyone who knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution or to obtain funds under the custody or control of a financial institution by means of false or fraudulent pretenses, representations or promises. A defendant convicted under that statute is subject to a fine of not more that $1 million or imprisonment for as many as 30 years, or both. The indictment levels numerous assertions which appear to provide the basis for bank fraud charges against Manafort: (1) "MANAFORT defrauded the institutions that loaned money on these properties so that they would lend him more money at more favorable rates that he would otherwise be able to obtain";[11] (2) "MANAFORT defrauded the banks that loaned him the money so that he could withdraw more money at a cheaper rate than he otherwise would have been permitted";[12] (3) "MANAFORT falsely represented to the bank and its agents that it was a secondary home";[13] (4) "As a result of his false representations, in March 2016 the bank provided MANAFORT a loan for approximately $3,185,000;[14] (5) "MANAFORT never intended to limit use of the proceeds to construction as required by the loan contracts."[15] Assuming that the special counsel has compelling evidence to support these allegations, it is unclear why Manafort was not charged with multiple 30 year bank fraud felonies.

Robert Adler is a partner in the Washington, D.C., office of Nossaman LLP. He previously served in the Tax Division of the U.S. Department of Justice.

[1] Para. 2.

[2] Para. 32.

[3] Para. 2.

[4] Id.

[5] Para. 32.

[6] Para. 4.

[7] Para. 15.

[8] Id.

[9] Para. 17.

[10] Para. 32.

[11] Para. 4.

[12] Para. 33.

[13] Para. 35.

[14] Id.

[15] Para. 36.