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White Collar Roundup - April 2015

DOJ Criminal Division Chief Lays Out Department's Initiatives for White-Collar Investigations and Prosecutions

At the American Bar Association's Annual National Institute on White Collar Crime, Leslie Caldwell, Assistant Attorney General for the Criminal Division of the U.S. Department of Justice (DOJ), provided insight into the division's focus in the coming year. First, she said that she and her team had been reviewing how decisions regarding declinations, deferred-prosecution agreements (DPAs) and nonprosecution agreements (NPAs) have been made in the past. She said she is committed to bringing more transparency to the process so companies know what benefits they might receive if they self-report criminal conduct. She predicted there would be an uptick in declinations for companies that self-report and fit within the so-called Filip factors regarding prosecuting organizations. Unfortunately, such declinations are not going to be made public by the DOJ. Second, she made absolutely clear that the DOJ is more interested in prosecuting individuals than companies. That said, she noted if a company does not cooperate with the DOJ's investigation, it is more likely that action will be taken against it. Finally, she expressed her commitment to increase the pace of white-collar investigations, which would include limiting the use of tolling agreements.

Utah's New White-Collar Registry

The legislature in the Beehive State approved a measure to create a white-collar offender registry. As reported here, the measure is aimed at slaking the "populist outrage over financial misdeeds." Taking a page out of the sex-offender registries, the state will create a website to register convicted white-collar criminals. The measure passed the Utah House with a vote of 65 to 7 and passed the Senate unanimously. The governor has endorsed the measure as well, declaring, "It doesn't matter what color collar a criminal wears." Might this be the beginning of a public-shaming campaign in other states for white-collar offenders? Only time will tell.

March Madness: Challenging the SEC's Perfect Home Court Record

Backed by the broader authority afforded by the 2010 Dodd-Frank financial regulatory overhaul, the "new normal" in Securities and Exchange Commission (SEC) enforcement actions is trying cases before the agency's appointed administrative-law judges as opposed to district court judges. The result is a 100% success rate for the SEC in such cases through the 2014 fiscal year, with a similar win rate for the two years prior. (This compares with a success rate below 80% in federal court during the similar period.) This has led the defense bar and some lawmakers to question?- including during a March 19 hearing before the House Financial Services Subcommittee?- whether such proceedings are unfairly stacked against the agency's targets. Defendants complain that such proceedings curtail their ability to develop a cohesive strategy because, among other things, the right to take depositions and the ability to collect evidence ahead of trial are limited. The SEC counters that administrative proceedings employ sophisticated fact finders and streamline the process. In the midst of

this debate comes the recent decision in *In re Delaney*, where an SEC administrative-law judge handed the agency a partial loss by ruling that the former CEO of Penson Financial Services Inc. "did not fail reasonably" to supervise two employees accused of violating securities lending rules.

United Kingdom Plans to Presume Guilt for Certain Banking Violators

The Financial Conduct Authority in the United Kingdom has published for comment new rules regarding a U.K. banking law. In the proposal, *Strengthening Accountability in Banking: A New Regulatory Framework for Individuals*, available here, the agency discussed its view of the "Presumption of Responsibility," which was part of the law itself. The agency noted, "[T]he Senior Manager with responsibility for the management of any of the firm's activities in relation to which the contravention occurred, is guilty of misconduct unless they satisfy the relevant regulator that they took such steps as a person in their position could reasonably be expected to take to avoid the contravention occurring (or continuing)." In other words, the burden of proof is on the senior manager and the presumption is one of guilt. This law would apply to senior managers in such roles "whether physically based in the UK or overseas." The authority welcomes comments on this rule by June 16.

Testimony About SEC Priorities and Insider Trading

SEC Chair Mary Jo White testified before the U.S. House Committee on Financial Services regarding the recent activities and current initiatives of the SEC. Chair White emphasized the commission's commitment to its three-part mission: "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." She noted the Division of Enforcement filed 755 enforcement actions in fiscal year 2014 and obtained more than $4.6 billion in disgorgement and penalties. She said, "Notable actions include the first series of cases involving violations of the 'market access' rule, the first action enforcing the 'pay to play' rule for investment advisers, the first action against a private equity firm relating to its allocation of fees and expenses, and the first anti-retaliation case to protect a whistleblower who reported improper trading activity." In response to questions on the recent upheaval regarding insider-trading enforcement, she said the SEC has considered writing regulations to specifically prohibit the practice.

Cherry-Picking Cases at a Court of Appeals

In a petition for a writ of certiorari to the U.S. Supreme Court, Motorola Mobility LLC assailed the U.S. Court of Appeals for the Seventh Circuit for its practice of allowing circuit judges to cherry-pick cases to hear on appeal. The petition explains, "This case also presents the Court an opportunity to exercise its supervisory power to put an end to a practice, unique among the circuits, that dramatically undermines the real and perceived impartiality of the appellate process in the Seventh Circuit." The petition goes on to explain that the judges on the panels hearing motions to allow interlocutory appeals are able to assign themselves the appeal on the merits. The petition argues, "[T]he Seventh Circuit has effectively given judges with particular jurisprudential interests or agendas an opportunity to thumb through the docket and assign themselves cases in which to advance those interests." To read the petition, click here.