March 1, 2013

White Collar Roundup - March 2013

SEC Examination Priorities for the Newish Year

The National Examination Program (NEP) of the U.S. Securities and Exchange Commission (SEC) released its Examination Priorities for 2013. The NEP's goal is to aid both investors and registrants and "to support the SEC's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." The NEP listed the following initiatives for 2013: (1) fraud detection and prevention; (2) corporate governance and enterprise risk management; (3) conflicts of interest; and (4) the use of technology in the capital markets.

Lobbying, Bribing and the Fine Line of Honest-Services Fraud

Tackling the ambiguity that can arise at the intersection of lobbying and bribery, the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Ring* clarified what the government must prove to convict a lobbyist of honest-services fraud. The court noted that "[t]he distinction between legal lobbying and criminal conduct may be subtle, but...it spells the difference between honest politics and criminal corruption." Ring was a lobbyist who had relied on political campaign contributions to not only curry favor with politicians but also to treat some "to dinners, drinks, travel, concerts, and sporting events." Some of the beneficiaries of such treats acted favorably toward Ring and his clients. After conviction for honest-services fraud, Ring appealed, claiming the district court gave erroneous instructions. But the appeals court disagreed, holding that the district court's instructions that "the government had to show that Ring gave gifts with an 'intent "to influence" an official act' by way of a corrupt quid pro quo" were correct.

Trying to Reinvent the Wheel

The Sixth Circuit in *United States v. Howley* upheld the theft-of-trade-secrets convictions of two tire engineers who had illegally photographed tires designed by Goodyear, in order to sell the photos to a Chinese competitor. After conviction, the defendants argued that the photographs they took did not constitute trade secrets because Goodyear had not taken "reasonable measures to keep the design of its tire-assembly machines secret." The Sixth Circuit held that Goodyear had, by fencing off the plant and requiring visitors to pass through a security checkpoint. Unfortunately for the defendants, who had received nonincarceratory sentences, the Sixth Circuit also vacated the sentences and remanded because the district court failed to make specific findings to justify its conclusion that the theft resulted in no loss to Goodyear.

Not Making a Statement--False or Otherwise

The Sixth Circuit also weighed in to the fray on a mortgage-fraud conviction in *United States v. Kurlemann*. There, the government prosecuted Kurlemann, a straw buyer in a complex mortgage-fraud scheme, for making a false statement or

report to a bank to secure a loan, in violation of 18 U.S.C. 1014. The allegation was that Kurlemann had failed to disclose that he had borrowed the down payment from the seller. At trial, the district court instructed the jury that a statement under the statute is false when "it contains half-truth or when it conceals a material fact." As the appeals court succinctly stated, "That is not right." The court concluded that under a statute criminalizing only "making a false or fraudulent statement" and not "failing to disclose any fact," making an omission or conveying a half-truth is not actionable. But the ruling was not all good for Kurlemann because the court affirmed his bankruptcy-fraud convictions.

Pushing for More on the FCPA

The U.S. Chamber of Commerce and 32 other pro-business organizations wrote a letter to the U.S. Department of Justice (DOJ) and the SEC to ask for further clarification on the Foreign Corrupt Practices Act (FCPA) in light of the agencies' joint release of *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Guide)*. In the letter, the business organizations commend the DOJ and SEC for publishing the *Guide* but seek further guidance on the following issues: (1) how the DOJ and SEC will weigh in making charging decisions the use of a robust and well-implemented compliance program as well as voluntary disclosures; (2) the definitions of "foreign official" and "instrumentality"; (3) whether the *Guide* altered the pre-existing standard for determining parent-subsidiary liability for anti-bribery violations; (4) successor liability against an acquiring company for pre-acquisition violations by an acquired entity; (5) further definition of the mens rea standard for corporate criminal liability for an FCPA violation; and (6) examples of how declination decisions have been made.

Enforcement of the FCPA Against Foreigners: Clear as Mud

As we noted in last month's *Roundup*, Judge Richard Sullivan of the U.S. District Court for the Southern District of New York was considering the foreign defendants' motion to dismiss an FCPA action because they claimed to have had insufficient ties to the United States. Judge Sullivan denied their motion on February 8 in *SEC v. Straub*. By happenstance, Judge Shira Scheindlin of the same court granted a similar motion on February 19 in *SEC v. Sharef*, which was also an action against a foreigner for violating the FCPA. The takeaway: Whether a foreigner can be haled into court in the United States to answer for an alleged FCPA violation is a fact-intensive inquiry.

Doing the Hokey-Pokey at the SEC

The Project on Government Oversight (POGO) issued a report with the descriptive title *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*. As one might guess, the report assails the apparent practice of SEC attorneys leaving the commission to enter the private sector and returning to the SEC from the private sector. Senator Charles Grassley, R-Iowa, issued a statement in which he commended the POGO and agreed with the problems inherent with this purported practice.