June 3, 2013

White Collar Roundup - June 2013

IRS Policy on Searches

The Internal Revenue Service (IRS) issued a Policy Statement that it will follow the holding of *United States v. Warshak* from the U.S. Court of Appeals for the Sixth Circuit "and obtain a search warrant in all cases when seeking from an internet service provider (ISP) the content of email communications stored by the ISP." The result is that the IRS will stop using subpoenas to obtain those documents and will not seek them in any civil administrative proceeding.

SEC Chairman Weighing Changes to No Admit/No Deny Policy

Recently appointed Securities and Exchange Commission (SEC) Chairman Mary Jo White recently testified before a House subcommittee about the SEC's budget. During the hearing, she addressed the SEC's long-standing policy regarding settling cases without requiring the defendant to admit or deny the allegations. That policy has come under fire lately, and Ms. White said she would review the policy.

Speaking of the No Admit/No Deny Policy ...

U.S. Senator Elizabeth Warren, D-Mass., wrote Ms. White, Attorney General Eric Holder and Chairman Ben Bernanke of the Board of Governors of the Federal Reserve System asking whether their respective agencies have "conducted any internal research or analysis on trade-offs to the public between settling an enforcement action without admission of guilt and going forward with litigation as necessary to obtain such admission." Senator Warren explained that, in her view, an enforcement agency's willingness "to take large financial institutions all the way to trial" is crucial to retain "leverage in settlement negotiations" and to avoid "settl[ing] on terms that are much more favorable to the wrongdoer." Senator Warren raised this issue with Comptroller of the Currency Thomas J. Curry at a previous hearing.

Banned by the SEC

The Second Circuit, in *SEC v. Bankosky*, reaffirmed the standard for banning an individual from serving as an officer or director, set forth in the court's 1995 decision of *SEC v. Patel*. At that time, the SEC was directed to issue such a ban "if the person's conduct demonstrates a substantial unfitness to serve as an officer or director." But the subsequent Sarbanes-Oxley Act of 2002 removed the word "substantiatial" from the statute. The Second Circuit ruled the Patel factors should still govern the analysis even though "'unfitness' is clearly a lower hurdle than 'substantial unfitness.'"

A Conflict Over Conflict Minerals

The U.S. District Court for the District of Columbia will hear arguments on cross-motions for summary judgment in litigation between the National Association of Manufacturers (NAM) (and others) and the SEC regarding conflict-mineral-reporting rules established by the SEC. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required the SEC to enact rules for public companies to disclose their use of "conflict minerals," i.e., tantalum, tin, gold or tungsten, from the Democratic Republic of the Congo and surrounding countries. The SEC rules require disclosures to begin in 2014 for the use of such minerals during 2013, and the NAM has sued to enjoin the rules. The plaintiffs allege the cost-benefit analysis in

the rule-making was grossly inadequate, the SEC misinterpreted Section 1502 and the rule violates companies' First Amendment rights.

No Such Thing As Too Big to Jail

During testimony before a House Financial Services subcommittee, acting Assistant Attorney General Mythili Raman dispelled the notion that the U.S. Department of Justice (DOJ) considered some financial firms "too big to jail." Ms. Raman began by saying "that no individual and no institution is immune from prosecution. Size does not equal immunity." Despite that statement, subcommittee members pressed Ms. Raman about whether the size of financial firms and the possible "collateral consequences" of a prosecution against them cause the DOJ to go easy on them. Ms. Raman said that "collateral consequences" of a prosecution are but one of the factors laid out in the U.S. Attorneys' Manual that prosecutors use when making charging decisions. For more on Ms. Raman's testimony, click here.