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White Collar Roundup - June 2014

"Instrumentality" Under the FCPA Defined by Appeals Court

The U.S. Court of Appeals for the Eleventh Circuit became the first U.S. appellate court to define "instrumentality" under the Foreign Corrupt Practices Act (FCPA). The case involved bribes paid to Telecommunications D'Haiti (Haiti Teleco), a company largely owned by the Haitian government. The Eleventh Circuit defined "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court noted that the meaning of "control" and of "a function the government treats as its own" are "fact-bound questions," but set forth an illustrative list of factors that should be considered in making this determination, including whether the entity provides services to the country's citizens and inhabitants; whether its key officers and directors are government officials or are appointed by government officials; the extent of the country's ownership of the entity or provision of subsidies, special tax treatment, loans or revenue from government-mandated fees; the entity's obligations and privileges under the country's laws; and whether the entity is widely perceived and understood to be performing governmental functions.

SEC's New Approaches to Charging Corporations and Individuals

Securities and Exchange Commission (SEC) Chair Mary Jo White spoke at the New York City Bar Association's White Collar Crime Institute on May 19. She referred to the SEC's increasing practice of charging companies with negligence under the antifraud provisions of the securities laws. White stated that charging companies with negligence is appropriate "when an entity makes a material misstatement or omission in the offer or sale of securities" and "failed to have appropriate policies or procedures, failed to properly train its employees, or failed to structure its operations so that people making disclosure decisions are provided with the necessary information to make those decisions on an informed basis." Shifting to individuals, she said that the SEC has begun a new practice of charging individuals under Section 20(b) of the Exchange Act, which imposes liability on a person who takes some action "by means of any other person" that would be unlawful for that person to do on his or her own. The SEC will bring such charges, White said, where "individuals have engaged in unlawful activity but attempted to insulate themselves from liability by avoiding direct communication with the defrauded investors," including those who participate in disseminating false or misleading information but who may not be liable under Rule 10b-5(b) as the "maker of the statement" under the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*.

Will the SEC Start Targeting Lawyers?

SEC Commissioner Kara M. Stein spoke at Compliance Week 2014 about (you guessed it) the importance of compliance. In her remarks, she discussed the importance of gatekeepers at companies as well as the SEC's enforcement efforts. She remarked that "one gatekeeper that often is absent from the list of cases I see every week are the lawyers." She noted that the lawyers are often at the center of transactions and that "when lawyers provide bad advice or effectively assist in a fraud, sometimes their involvement is used as a shield against liability for both themselves, and for others." She pondered whether the SEC is "treating lawyers differently from other gatekeepers, such as accountants" and suggested that the SEC "should carefully review the role that lawyers play in our markets, with a view toward how they can better help deter misconduct and prevent fraud."

"Is This Thing On?"

U.S. Attorney General Eric Holder announced a new policy that the agencies within the Department of Justice (DOJ) will electronically record all interviews of suspects held in federal custody. The new policy is a reversal of the department's previous policy to prohibit recording such interviews. The policy, which Attorney General Holder said will "ensure that [the DOJ agencies] have an objective account of key investigations and interactions with people who are held in federal custody," goes into effect on July 11. Affected agencies include the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Drug Enforcement Administration; and the U.S. Marshals Service.

Second Circuit En Banc Dispute

Dissension among the judges of the U.S. Court of Appeals for the Second Circuit emerged when the court denied rehearing en banc in *United States v. Taylor*. The underlying case involved an appeal from a conviction for Hobbs Act robbery. In the panel opinion, the court vacated the conviction and ruled that the defendant's confession during interrogation was involuntary because he intermittently fell asleep during the interview. Dissenting from the en banc denial, Judge Reena Raggi, joined by five other judges (making the total count seven judges for en banc review, six against), suggested that the panel had misapprehended Supreme Court precedent and itself made unwarranted findings of fact. Separately, Judge Jos? Cabranes commented on the en banc practice in the Second Circuit, which he indicated has hewed to former Judge Learned Hand's practice "never [to] vote to convene an en banc court." As for the nub of the issue, perhaps had the interview been electronically recorded ...

Blistering Report Against America's Penchant to Incarcerate

As discussed in this editorial, the National Academy of Sciences issued a 444-page report regarding incarceration in the United States. The report focuses on drug, weapon and immigration offenses, but touches on increased incarceration for fraud offenses. Specifically, the report indicates that from 1980 to 2000, "[t]he incarceration rate for fraud grew considerably (about 227 percent)." The report evaluates the societal costs and benefits of incarceration, especially for nonviolent offenses, concluding that "federal and state policy makers should take steps to significantly reduce the rate of incarceration in the United States."