April 2, 2012

White Collar Roundup - April 2012

A Stay with a Touch of Sass

The U.S. Court of Appeals for the Second Circuit granted a stay of the proceedings in the case between the Securities & Exchange Commission (SEC) and Citigroup Global Markets Inc. Southern District of New York Judge Jed S. Rakoff previously refused to approve the parties' proposed consent judgment, claiming it was not fair, adequate, reasonable or in the public interest. In granting the stay, the per curiam opinion noted, "[a] still more significant problem is that the court does not appear to have given deference to the S.E.C.'s judgment on wholly discretionary matters of policy." While the court did not rule on the merits of the case, this opinion bodes well for the SEC and Citigroup.

Speaking of Judge Rakoff . . .

Judge Rakoff ruled that the Department of Justice (DOJ) must review the SEC's interview notes with witnesses during its investigation of Rajat K. Gupta to determine whether any of the material is discoverable in its criminal case against Gupta. The judge rejected the DOJ's argument that the SEC is a separate agency, alleviating it of responsibility to review SEC material. For more on the story, click here.

Anonymity Was His Name. (If Only) Silence, His Native Tongue.*

A federal prosecutor in Louisiana admitted to using a pseudonym to post hundreds of defamatory comments about defendants he was investigating. The U.S. Attorney for the Eastern District of Louisiana suspended him from participating in any prosecutions he posted about. The chief federal prosecutor in New Orleans also referred the assistant U.S. attorney (AUSA) to the DOJ's Office of Professional Responsibility for consideration of whether to discipline the suspended prosecutor for the conduct.

*Adapted from this.

Inspector, Mind Your P's and Q's

New York state plans to soften its approach to Medicaid audits. While such audits have resulted in billions of dollars of recovery for Medicaid overpayments, those being audited bristled at the aggressiveness of those audits. Gov. Andrew Cuomo has replaced the first head of the Office of the Medicaid Inspector General with a replacement who pledges to conduct audits in a more collaborative fashion.

All Fraud, All the Time

U.S. Attorney General Eric Holder told the National Association of Attorneys General that the DOJ has "issued civil subpoenas to 11 different financial institutions" regarding the mortgage-backed securities market. He also noted, "although I can't go into detail about ongoing investigations, I can tell you that we expect more to follow." And, of course, no DOJ speech would be complete without a warning about the department's continued focus on combating healthcare fraud.

"Take Five" and Avoid Decryption

The Eleventh Circuit held that a subpoena calling for a suspect to decrypt and provide the contents of his seized hard drives would run afoul of the Fifth Amendment's privilege against self-incrimination. In the case, after the government's forensic examiners could not examine the encrypted information on seized hard drives they suspected contained child pornography, the government sought an order of limited-use immunity to compel the suspect to decrypt the drives without triggering the Fifth Amendment. The order was granted, preventing the government from using the defendant's act of production against

him at trial. Instead of cooperating, the defendant refused, and after a show-cause hearing, the court held him in contempt. He appealed. The Eleventh Circuit held that only full immunity would protect the defendant's Fifth Amendment rights by preventing the government from using the act of production or the contents of the drives against him.

Search Incident to Arrest? There's an App for That.

In an extensive opinion by Judge Richard Posner, the Seventh Circuit allowed the police to search a cellphone incident to arrest. In this case, when the officers searched the cellphone only for its phone number, which they used to further their drug-distribution prosecution and as evidence in the case, the court canvassed the potential perils of allowing warrantless searches of phones or tablets incident to arrest. The opinion also provides quite a bit of food for thought about what both law-enforcement officers and their targets could do with the data on their phones by using various smartphone and tablet applications.

A Deal's a Deal

The Ninth Circuit held the government to its promise in a plea agreement not to use at sentencing any statements the defendant made in proffer sessions. The plaintiff had agreed to cooperate and pleaded guilty pursuant to a plea agreement that included the aforementioned immunity provision but allowed the government to argue for a two-level sentencing enhancement under the U.S. Sentencing Guidelines. At the sentencing, the AUSA made such arguments, advising the judge of the defendant's incriminating proffer statements. The district court agreed with the government and applied the enhancement. The Ninth Circuit disagreed (finding the unpreserved error to be plain), vacated the judgment and remanded the case for resentencing.

***Extreme Makeover*: SEC Technology Edition**

SEC Chairman Mary L. Schapiro discussed the details of the SEC's initiative to bring its IT "systems into the 21st century." Chairman Schapiro identified three goals for the overhaul: (1) to enhance the SEC's investor-protection mission; (2) to enhance internal efficiencies at the commission; and (3) to improve the commission's interactions with the public.