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White Collar Roundup - February 2012

Raising the Stakes

The U.S. Sentencing Commission has proposed amendments to the U.S. Sentencing Guidelines to increase the offense-level ranges for certain securities-fraud offenses. The amendments propose new multilevel enhancements called for by the Dodd-Frank Wall Street Reform and Consumer Protection Act. For example, the commission proposes a two-level enhancement for sophisticated insider trading and a four-level enhancement for specific types of financial harms that jeopardize institutions. For a "reader friendly" version of the proposed amendments, click here. Public comments are due by March 19, 2012.

Only Gain. No Pain.

A convicted fraudster cannot be ordered to pay restitution that reflects only his gain rather than the victim's loss, according to this opinion from the U.S. Court of Appeals for the Seventh Circuit. In the case, the defendant was ordered to forfeit approximately $16 million and to pay restitution of that same amount. Judge Richard Posner, writing for the court, reasoned the district court erred by ordering restitution based on ill-gotten gains rather than calculating the victim's losses. Therefore, "the order of restitution cannot stand."

The Precarious Business of Handling Jurors

The Second Circuit vacated the conviction of the attorney convicted for his role in the fraud scheme at Refco Inc. After 22 days of trial, the jury began to deliberate. On the fifth day of deliberations, the foreman sent a note to the judge about difficulties between jurors during deliberations. Instead of bringing this issue to the parties' attention, the judge conducted an ex parte interview with one of the jurors, during which the judge gave a supplemental instruction. Because the defendant was not invited to attend this colloquy, he was deprived of his right to be present at every stage of the trial, justifying a new one.

Private Suits for Foreign Corrupt Practices

If passed and signed into law, HR 3531 would allow private suits against certain foreign companies and individuals who violate the Foreign Corrupt Practices Act (FCPA). While it is just a bill, passage of the Foreign Business Bribery Prohibition Act of 2011 would significantly change the landscape of the FCPA by authorizing private rights of action for issuers, domestic concerns or other persons who are "damaged" by any "foreign concern" that violates the FCPA.

Paying a High Price for 'Structuring'

A defendant convicted of "structuring" cash withdrawals -- breaking them into chunks of less than $10,000 each to avoid bank reporting requirements under 31 U.S.C. 5324(a)(3) -- to pay her employees was properly sentenced to a fine of the entire amount of money withdrawn, according to this opinion by the Seventh Circuit. The defendant argued the order to forfeit $279,500 violated the Eighth Amendment's excessive fines clause, but the court rejected her argument, reasoning the order was not disproportional to the gravity of her offense.

Pulling Out the Checkbook

A report from National Economic Research Associates Inc. about the settlement trends of the Securities and Exchange Commission (SEC) explains that the SEC settled a total of 682 cases in fiscal year 2011, which was on par with the 680 settled cases in fiscal year 2010. But the report describes a shift in the type of cases the SEC brought, which now focus more

on misrepresentations or misappropriation by financial services firms. Also, according to the report, the median settlement value for companies of $800,000 in 2010 almost doubled to $1.47 million in 2011; for individuals it was $175,000 in 2011.

Much Ado About Nothing -- or, at Least, Very Little

The SEC's director of enforcement, Robert Khuzami, said the SEC will stop allowing civil defendants to settle cases with the SEC without admitting or denying liability. But -- and it is a big "but" -- that change applies *only* when the defendant pleads guilty or confesses to the alleged conduct in a parallel criminal proceeding. The result: The bulk of SEC settlements will not be affected. For a news report on the change, click here.