December 3, 2012

White Collar Roundup - December 2012

Decrypting the FCPA

In a show of solidarity, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) issued a guidance manual for the Foreign Corrupt Practices Act (FCPA), aptly titled *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*. The resource guide "aims to provide businesses and individuals with information to help them abide by the law, detect and prevent FCPA violations, and implement effective compliance programs." It's a good read and chock-full of useful ... well ... guidance.

Committing to the FCPA

The longest-serving assistant attorney general of the Criminal Division of the DOJ in 50 years, Lanny A. Breuer, spoke about the DOJ's enduring commitment to "combating corruption around the world" by using, among other tools, the FCPA. He emphasized that the DOJ's "global anti-corruption mission has seeped into the Criminal Division's core. And there is no turning back." Mr. Breuer reported that since 2009, the DOJ's FCPA unit has entered into more than 40 corporate resolutions, resulting in $2 billion in fines, and secured convictions of more than 36 individuals. He also took the opportunity to praise his staff and the SEC for their work on the aforementioned FCPA resource guide.

The Enforcers

Not to be outdone by the DOJ's boasting about its own successes, the SEC released its own report of enforcement actions from October 1, 2011, through September 30. The SEC announced it filed 734 enforcement actions and obtained orders for "more than $3 billion in penalties and disgorgement for the benefit of harmed investors." Robert Khuzami, director of the SEC's Division of Enforcement, said, "It's not simply numbers, but the increasing complexity and diversity of the cases we file that shows how successful we've been." The SEC also credited its recent reorganization of the Division of Enforcement for much of its success.

The Whistleblowers

The SEC also released its Annual Report on the Dodd-Frank Whistleblower Program for fiscal year 2012. The report notes the SEC received 3,001 whistleblower tips last year, mostly regarding corporate disclosures and financials, offering fraud, and manipulation. The SEC reported receiving whistleblower submissions from people in all 50 states, the District of Columbia and Puerto Rico, as well as from 49 other countries.

The Defendant's Gain Is Not the Victim's Loss

The U.S. Court of Appeals for the District of Columbia Circuit clarified in *United States v. Fair* that any restitution order under the Mandatory Victim Restitution Act (MVRA) must be tied to the actual loss to the victim and not to the intended loss or the perpetrator's actual gain. In the case, the defendant had pleaded guilty to copyright infringement for selling pirated copies of Adobe Systems' software on eBay for a hefty six-figure profit. The sentencing court ordered him to pay restitution in that amount, reasoning Adobe "has the right to be restored to the revenue it lost [in] its right to collect on actual sales that were made." The appeals court reversed, noting that the MVRA's authorization of restitution is "limited to the actual, provable loss suffered by the victim and caused by the offense conduct." Anything more would be "punitive in nature and thus fall outside the scope of the MVRA."

Mortgage Fraud Killed the Radio Star

The Second Circuit vacated the sentences of two mortgage fraudsters in *United States v. Lacey* because the trial court had erroneously enhanced its U.S. Sentencing Guidelines range by two levels because the scheme was "committed through mass-marketing." The mortgage-fraud scheme involved running radio advertisements to find potential straw buyers to engage in short-sale transactions. When a straw buyer contacted the defendants, the defendants used the buyer to submit false mortgage applications and documentation to obtain loans to buy foreclosed properties. While the scheme itself involved mass-marketing, the appeals court held that the guidelines enhancement "applies only if the audience of the mass-marketing was in some sense victimized by the scheme," which was not apparent in the record before the court. As a result, the court vacated the sentence and remanded for further fact finding.

Don't Bank on It

The Second Circuit also reiterated in *United States v. Nkansah* that to obtain a conviction for bank fraud, the government must prove the defendant (1) engaged in a scheme designed to obtain money from a bank and (2) intended for the bank to be a victim by exposing the bank to actual or potential loss. The case involved a scheme to fraudulently obtain illicit tax refunds from the Internal Revenue Service by filing bogus tax returns. To complete the fraud, the defendants opened several bank accounts under fake names into which they deposited the tax-refund checks from the Department of the Treasury. The appeals court held there was insufficient evidence that the defendants intended to harm the banks, even though there was plenty of evidence they intended to harm the Treasury.