December 2, 2014

White Collar Roundup - December 2014

False Claims Act Cases Continue to Be a Priority of DOJ

The Department of Justice (DOJ) announced it obtained a record $5.69 billion in settlements and judgments from False Claims Act (FCA) civil cases in fiscal year 2014. According to the government's press release, the recoveries relate to the DOJ's investigations into fraud in the housing and mortgage context and in the healthcare industry. The recoveries also reflect increased reports from whistleblowers about FCA violations. The DOJ stated it "will continue to enforce the law aggressively to ensure the integrity of government programs."

Third Time's a Charm: Second Circuit Sends Case Back Again

The U.S. Court of Appeals for the Second Circuit sent a case back to a district court in the Northern District of New York for a third time, finding procedural error in the sentence and finding abuse of discretion as to restitution. In the case, *United States v. Desnoyers*, the defendant was convicted of crimes relating to malfeasance in asbestos abatement projects. After sending the case back twice for resentencing, the Second Circuit again disagreed with the district court's procedure in sentencing Desnoyers to probation plus home confinement, where the government had argued that the range was 108-135 months' imprisonment. The Second Circuit found that the district court committed "clear error" in failing to reconcile its factual findings at sentencing that Desnoyers was less culpable than his co-conspirators and had no direct supervisory role with its adoption of the findings in the presentence investigation report (PSR) that Desnoyers devised and directed the scheme and organized the illegal work. The Second Circuit also found that the district court abused its discretion in imposing only a prorated portion of the restitution amount on Desnoyers when the adopted PSR suggested his knowledge and participation were commensurate with that of his co-conspirators.

Governments Increasingly Using Facebook to Investigate

Facebook announced it received 24 percent more requests for information from governments around the world in the first half of 2014 as compared with the last six months of 2013. According to the company, "the vast majority of these requests relate to criminal cases, such as robberies or kidnappings." Over 15,000 of those requests came from the U.S. government, in the form of search warrants, subpoenas, emergency disclosures, 18 U.S.C. 2704(d) orders, pen registers, wiretaps and other court orders. Facebook reported it provided information in about 80 percent of those situations. Facebook also stated it has "strict processes" in place to respond to the requests, including checking each request for legal sufficiency, requiring detailed descriptions of legal and factual bases for the requests, and pushing back when requests are illegal, overly broad or vague.

ABA Economic Crimes Sentencing Task Force Issues Report

In April 2013, the Criminal Justice Section of the American Bar Association assembled the Economic Crimes Sentencing Task Force to evaluate the United States Sentencing Guidelines as they pertain to economic crimes and to propose alternative guidelines to effectuate necessary reforms. The Task Force comprises federal judges, law professors, practitioners, representatives from criminal defense organizations, and observers from the DOJ and the Federal Defenders. The Task Force issued its final report this month. The report proposes a rewrite of Section 2B1.1 of the United States Sentencing Guidelines, which relates to economic crimes. The report includes the proposed guideline, notes about the

reasoning behind the guideline and case examples of how it would work.

Report of the SEC Office of the Whistleblower

The Securities and Exchange Commission issued its report to Congress detailing the state of its whistleblower program for 2014. In that report, the SEC described its whistleblowers, debunking the tales told through Hollywood adaptations. The SEC reported 14 whistleblowers have received awards so far. Forty percent of them were current or former company employees, and more than 80 percent of them raised their concerns internally first. It was only after doing so that they reached out to the SEC. Twenty percent of the award recipients were contractors or consultants, and the rest were investors, professionals in the same industry as the alleged wrongdoers or personal acquaintances of the alleged wrongdoers. What the SEC did not reveal was any personally identifiable information about the whistleblowers. But these data support the importance of strong, internal compliance programs to ensure that the complaints of whistleblowers are addressed internally and satisfactorily, obviating the need for whistleblowers to go outside their company.

Defending the Home-Court Advantage

Andrew Ceresney, the director of the SEC Division of Enforcement, provided a cogent defense of the division's increased use of administrative proceedings to enforce its rules in a speech at the American Bar Association's Business Law Section Fall Meeting. After lauding his division's successes in 2014, Ceresney turned to its use of the administrative forum. He advanced four benefits to the administrative forum: (1) it results in "prompt decisions," (2) it uses administrative law judges (ALJs) who are "specialized factfinders," (3) it allows the ALJs to go beyond the Federal Rules of Evidence "to give each piece of evidence the weight that they deem appropriate," and (4) it allows some cases that can only be brought administratively to be adjudicated. At base, Ceresney emphasized that the division takes each case as it comes and "make[s] a case by case determination of which forum is appropriate based on the particular facts of the case."