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White Collar Roundup - November 2012

A Strange FCPA Interpretation From the DOJ

A U.S. Department of Justice (DOJ) opinion about whether certain conduct is prohibited by the Foreign Corrupt Practices Act (FCPA) has sent shock waves through the FCPA world as it appears to reverse the long-standing view of who a "foreign official" is under the act. In the opinion, the DOJ announced that "a member of the royal family of [a] Foreign Country . . . does not qualify as a foreign official" under the FCPA "so long as the Royal Family Member does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family." For an analysis of the opinion, click here.

The Sixth Amendment and Mandatory Minimums

The U.S. Supreme Court will consider whether to bring to mandatory minimum sentences the Sixth Amendment rigors laid down in *Apprendi v. New Jersey*, which requires a jury finding in order to enhance a statutory maximum sentence. The issue before the Court will be "[w]hether this Court's decision in *Harris v. United States*, holding that the Constitution does not require facts which increase a mandatory minimum sentence to be determined by a jury, should be overruled." Argument is set for mid-January, and the Court's ruling could again change the way sentences are determined.

A High-Powered Task Force

New York County District Attorney Cyrus Vance Jr. has established a White Collar Crime Task Force, made up of prominent prosecutors, former prosecutors, defense attorneys, and academics to help forge stronger anti-corruption and anti-fraud laws in New York. As Mr. Vance said, "New York is the financial capital of the country, and we have a responsibility to make sure that state prosecutors in New York have the tools they need to combat white-collar crime in the 21st century." The 26-member task force hopes to revamp New York State's "1970s-era tools" to better combat "21st-century crime."

A Blow to the Usefulness of the Fraud Guideline

District Court Judge Jed S. Rakoff of the Southern District of New York imposed a two-year sentence on Rajat Gupta for his insider-trading conviction. In his Sentencing Memorandum and Order, Judge Rakoff criticized the U.S. Sentencing Guidelines' ability to dictate an appropriate sentence. He wrote, "[t]he notion that this complicated [sentencing] analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense." Judge Rakoff made his point as follows: "Nowhere is this more obvious than in this very case, where the Sentencing Guidelines assign just 2 points to Mr. Gupta for his abuse of a position of trust--the very heart of his offense--yet assign him no fewer than 18 points for the resultant but unpredictable monetary gains made by others, from which Mr. Gupta did not in any direct sense receive one penny."

Are Higher Fines the Answer?

Commissioner Luis Aguilar of the Securities and Exchange Commission (SEC) spoke about how to maximize the effectiveness of the SEC's enforcement of the federal securities laws. After noting that investors have "little or no trust in our markets," he emphasized that the SEC must focus on holding individuals accountable, on maximizing deterrence by using all available sanctions and on paying attention to recidivists. He also urged Congress to enact the proposed Stronger Enforcement of Civil Penalties Act of 2012, which would increase certain per-offense financial penalties to the greater of (1) $1 million for individuals and $10 million for firms, (2) three times the gross pecuniary gain, or (3) the total losses incurred by investors.

Forget the SEC, Worry About the States

The North American Securities Administrators Association (NASAA) issued a report on the "extent and prevalence of enforcement efforts by state securities regulators." The NASAA found state securities regulators continue to investigate financial firms in large numbers. It also found an uptick in enforcement efforts that relate to "investment advisers, Internet offerings, crowdfunding and Reg D issues." Further, it noted that "Reg D and real estate schemes remain the most common type of violative products or practices."