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White Collar Roundup - October 2012

The DOJ and a DPA

U.S. Department of Justice (DOJ) Assistant Attorney General Lanny Breuer told lawyers at the New York City Bar Association about the benefits of deferred-prosecution agreements (DPAs) in the DOJ's efforts to improve corporate behavior. Breuer said bluntly, "What I'm here to tell you is that, along with the other tools we have, DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe." To win a DPA, a company must "acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement." But the prospect of a forthcoming prosecution for violating a DPA inspires companies to "prove to us that they are serious about compliance." All told, one of the most persuasive reasons for the DOJ's agreement to enter into a DPA is the likely impact of a prosecution on the innocent employees at companies caught in the DOJ's crosshairs.

A Long Time to Reflect on Fraud

The U.S. Court of Appeals for the Second Circuit affirmed the 25-year sentence of a defendant who pleaded guilty to wire fraud for participating in a Ponzi scheme. After stipulating to a Guidelines range of imprisonment of 324 to 405 months and obtaining a below-Guidelines sentence of 300 months' incarceration, the defendant appealed the reasonableness of his sentence. In its summary order, the court determined that the below-Guidelines sentence was reasonable in light of the defendant's conduct, which "took in thousands of middle- and lower-income investors, many of whom lost pensions, college funds and homes" and resulted in others simply becoming "destitute." The court refused the defendant's contention that "his age, his gambling addiction, his good works, his family, similar sentences, his need for rehabilitation and his cooperation" should compel the district court to impose an even lower sentence.

Flexing Its Muscle for Cash

The U.S. Department of Health and Human Services (HHS) won summary judgment on its suit to collect a $4.35 million penalty it imposed for violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HHS imposed the penalty on Uplift Medical, P.C., for its failure to comply with two provisions of HIPAA. HHS brought suit to collect on its penalty, which Uplift opposed. The U.S. District Court for the District of Maryland granted HHS's motion for summary judgment in large part because of Uplift's failure to exhaust its administrative remedies.

Angry Birds: Meet Your Match

Unsure about how to protect patient privacy? HHS to the rescue. The agency has created an online game to help teach the do's and don'ts. It's not Angry Birds, but it's loads of fun.

Connecticut's Latest and Greatest E-mail Address

Speaking of privacy issues, the Connecticut Attorney General has established the e-mail address "ag.breach.ct.gov" for companies to use to notify him of any data breaches. Companies must report such data breaches to the Connecticut Attorney General as a result of the data-breach notification law passed over the summer. The law takes effect on October 1, 2012. Click here for Attorney General George Jepsen's statement.

You Have the Right to an Attorney (Who May Testify Against You)

The Seventh Circuit held that a defendant's former attorney may testify for the government without running afoul of the Sixth Amendment. In the case, the defendant, who was incarcerated pending trial, mailed a letter to his attorney, marked "legal mail" to avoid its being opened by the authorities. The letter instructed the lawyer to forward an enclosed letter to the defendant's cousin. The lawyer read the enclosed letter, which instructed the defendant's cousin to come forward with a phony alibi to exonerate the defendant. Rather than comply, the lawyer sought to withdraw as counsel and turned the letter over to the government. The court held that the lawyer's conduct violated neither his ethical obligations (after all, the defendant was not seeking legal advice) or the defendant's Sixth Amendment rights (because the lawyer had withdrawn as counsel prior to testifying).

Hunting for Tax Evaders Across the Pond

The U.S. Department of the Treasury announced the signing of a bilateral agreement between the United States and the United Kingdom to share information about potential tax evaders. The agreement was the first to be signed as a result of the Foreign Account Tax Compliance Act (FATCA), which Congress enacted in 2010. The FATCA allows the U.S. government to share information with foreign governments (and vice versa) to prevent noncompliance by U.S. taxpayers.

To Self-Report or Not to Self-Report?

Self-reporting of violations of the Foreign Corrupt Practices Act (FCPA) does not result in lower fines, according to a study available here. The size of the fines imposed was driven by "the size of bribe, the profit related to the bribe, and the amount of business affected by the bribe" but not by whether the violations were self-reported. And the size of the fine "increases if a subsidiary faces FCPA charges, if the FCPA violation occurs in multiple countries, if the ultimate parent company of entities involved in the FCPA violation is foreign, and if foreign regulators are involved in the action."