January 4, 2013

White Collar Roundup - January 2013

HSBC, Drugs and $1.9 Billion

Banking giant HSBC agreed to forfeit a staggering $1.256 billion, pay a $665 million fine and enter into a deferred-prosecution agreement for permitting the laundering of approximately $881 million in illegal-drug proceeds through the U.S. financial system. According to press releases from the Department of Justice (DOJ) and the U.S. Attorney's Office for the Eastern District of New York, narcotics traffickers and others laundered hundreds of millions of dollars through HSBC because of HSBC's failure to implement an appropriate anti-money laundering program and to conduct due diligence on its foreign correspondent account holders. HSBC also violated the International Emergency Economic Powers Act and the Trading with the Enemy Act by conducting transactions on behalf of clients in countries that were subject to Office of Foreign Assets Control (OFAC) sanctions at the time of the transactions, including Cuba, Iran, Libya, Sudan and Burma. The U.S. Attorney's Office for the Eastern District of New York filed a felony criminal information against HSBC but asked the court to place it in abeyance for five years during which HSBC must comply with the terms of its deferred-prosecution agreement, which include corporate monitorship, new compliance programs and clawback of executive compensation. At present, no individual prosecutions of HSBC bank officials have been announced.

Fair Enough

The former CEO of Fair Financial Co., an Ohio financial-services firm, was sentenced to 50 years in prison for his role in a scheme to defraud approximately 5,000 investors of more than $200 million, according to a press release from the DOJ. The former chairman of the board of Fair was sentenced to 25 years' imprisonment, and the former CFO was sentenced to 10 years' imprisonment. The district court also ordered the defendants to pay restitution in the amount of $208 million. The press release reports that, as part of the scheme, the defendants concealed from investors Fair's true financial condition, failed to issue financial statements audited by independent accountants, made false and misleading statements to investors, and directed employees of Fair not to make interest or principal payments to investors. The release also states the defendants used investors' money for their own expenses as well as those of their friends, their family and their struggling businesses.

Gimme (Tax) Shelter

In a split opinion, the U.S. Court of Appeals for the Second Circuit in *United States v. Coplan* overturned the convictions of two defendants in the Ernst & Young tax-shelter case. The defendants in the case were three tax attorneys and one accountant who designed and implemented tax shelters for high-net-worth individuals who were seeking to shelter at least $20 million from income-tax liability. The defendants were convicted of charges of conspiracy, tax evasion, obstructing the due administration of the Internal Revenue Service (IRS) and making false statements to the IRS in connection with the tax shelters. The Second Circuit painstakingly examined the evidence against the defendants and concluded the evidence as to two of the tax attorneys was insufficient to support their conspiracy and tax-evasion convictions and, as to one of the tax attorneys, was insufficient to support his conviction of obstructing the IRS. The tone of the opinion reflected the court's discomfort with the equivocal nature of the evidence reflecting the attorneys' criminal intent.

Freedom to Speak Off Label

In another split opinion, the Second Circuit in *United States v. Caronia* overturned the conviction of a pharmaceutical sales

representative on "misbranding" charges related to his promoting the Food and Drug Administration-approved drug Xyrem? for off-label use. Caronia argued that he was convicted for his speech in violation of his rights under the First Amendment. The government countered that Caronia's speech was merely evidence of his intent to introduce a misbranded drug into interstate commerce. The Second Circuit disagreed with the government and found that Caronia's prosecution and conviction rested entirely on his speech. Concluding that the misbranding statute's restrictions on speech were subject to heightened scrutiny, the majority found that although the government had substantial interests in ensuring drug safety, the statute's prohibition on lawful, off-label promotion by pharmaceutical manufacturers and their representatives did not directly advance those interests and was not narrowly tailored.

In Other Misbranding News...

In the Eastern District of New York, American biotechnology giant Amgen Inc. pleaded guilty to misbranding the drug Aranesp?, which is used to treat anemia. According to the press release, Amgen's efforts to promote unapproved dosages of Aranesp were the company's core business strategy to gain market share from Johnson & Johnson, its only competitor for that type of drug. As part of the plea deal, Amgen agreed to pay $762 million to resolve criminal and civil liability arising from its misbranding of Aranesp and two other drugs, its scheme of providing illegal kickbacks to a number of entities to influence healthcare providers to use its products, and its engaging in false price reporting practices involving several of its drugs. The press release states that the settlement represents the single largest criminal and civil False Claims Act settlement in U.S. history involving a biotechnology company.

Third Time's a Pharm(a)

In unrelated-to-misbranding news, pharmaceutical giant Eli Lilly and Co. agreed to pay more than $29 million in connection with charges by the Securities and Exchange Commission (SEC) that it made improper payments to officials in Russia, Brazil, China and Poland in violation of the Foreign Corrupt Practices Act (FCPA). According to the SEC complaint filed in the U.S. District Court for the District of Columbia, Eli Lilly subsidiaries made the illegal payments, including bribes, improper gifts and cash payments to government-employed physicians, to win millions of dollars of overseas business.