January 3, 2012

White Collar Roundup - January 2012

No Unanimity Required The unanimity requirement for convictions of crimes in federal court, laid out in Federal Rule of Criminal Procedure 31(a), does not apply to overt acts under the criminal-conspiracy statute in the U.S. Code. The U.S. Court of Appeals for the Second Circuit affirmed a conviction in which the court had not instructed the jury that it must be unanimous as to which overt acts were committed. In its ruling, the court distinguished between the elements of an offense (requiring unanimity) and specific facts relating to those elements (not requiring unanimity). **"White" and "Green" Text Messages Are Seen (and Not Suppressed)** A legal search of the contents -- text messages, directories and call logs -- of a cellphone requires no more than the use of the generic terms "correspondence, address books and telephone directories" in a search warrant, according to a Fifth Circuit opinion. There, while the cellphone seized was found in plain sight when federal agents stormed a possible cocaine and marijuana drug-trafficking operation, their warrant application did not list "cellphones" among the items to be searched. Nevertheless, they searched the phone's text messages and found incriminating evidence (such as references to the "white" and the "green") against the defendant, who tried in vain to have those elaborately coded messages suppressed. **SEC to Judge Rakoff: "Game On"** The Securities and Exchange Commission (SEC) director of the Division of Enforcement, Robert Khuzami, released a statement in connection with the SEC's notice of appeal of Judge Jed S. Rakoff's rejection of its proposed consent judgment with Citigroup. Mr. Khuzami contended that Judge Rakoff had improperly changed the rules of the game by requiring an admission of facts before agreeing to accept the consent judgment. Mr. Khuzami also defended the SEC's entering into the $285 million deal with Citigroup as justified in light of the circumstances of the case. **Should the SEC Have an Extreme Makeover** Yes, according to this report by the U.S. Chamber of Commerce. The report details the history and functionality of the SEC and makes 28 recommendations for reform, nine of which relate to enforcement. Among other things, the report suggests enhanced training on investigative techniques, increased staffing and reduced malingering on closing stale investigations. **Welcome to the Hot Seat** The Centers for Medicare & Medicaid Services (CMS) is used to taking companies to task for improper behavior. But now CMS is in the sights of Senator Charles Grassley, R-Iowa, who wrote on behalf of the Senate Committee on the Judiciary about whether CMS had improperly held meetings with hedge-fund managers and political-intelligence brokers. Sen. Grassley noted a CMS whistleblower's allegations about the alleged misconduct and demanded that CMS promptly respond to his 19 questions. **Nothing Sweet About These Cookies** The United Kingdom's Information Commissioner's Office (ICO) issued guidance on the new rules governing the use of cookies and similar technologies for websites. The guidelines relate to the U.K.'s implementation of the European Union's E-Privacy Directive, which attempts to strengthen the privacy protections for individual Internet users. The ICO plans to begin enforcing the new rules in May 2012. In response to the hypothetical question "What happens if I do nothing and wait for it all to go away?" the ICO retorts, "This isn't going away. It's the law." **Uncle Sam's Counting the Benjamins** Deputy Attorney General James M. Cole spoke about the Department of Justice (DOJ) campaign to cut fraud, waste and abuse from government expenditures. Deputy Cole noted that the DOJ recovered more than $5.6 billion from fraudsters in 2011, which broke all previous single-year-recovery records. After cataloging some examples of fraud, Deputy Cole said, "Our message could not be clearer-- we will aggressively investigate and prosecute those who seek to defraud the American people. Those who commit fraud will be held to account."