DAY PITNEY LLP

news

June 2013

White Collar Roundup

IRS Policy on Searches

The Internal Revenue Service (IRS) issued a Policy Statement that it will follow the holding of *United States v. Warshak* from the U.S. Court of Appeals for the Sixth Circuit "and obtain a search warrant in all cases when seeking from an internet service provider (ISP) the content of email communications stored by the ISP." The result is that the IRS will stop using subpoenas to obtain those documents and will not seek them in any civil administrative proceeding.

SEC Chairman Weighing Changes to No Admit/No Deny Policy

Recently appointed Securities and Exchange Commission (SEC) Chairman Mary Jo White recently testified before a House subcommittee about the SEC's budget. During the hearing, she addressed the SEC's long-standing policy regarding settling cases without requiring the defendant to admit or deny the allegations. That policy has come under fire lately, and Ms. White said she would review the policy.

Speaking of the No Admit/No Deny Policy ...

U.S. Senator Elizabeth Warren, D-Mass., wrote Ms. White, Attorney General Eric Holder and Chairman Ben Bernanke of the Board of Governors of the Federal Reserve System asking whether their respective agencies have "conducted any internal research or analysis on trade-offs to the public between settling an enforcement action without admission of guilt and going forward with litigation as necessary to obtain such admission." Senator Warren explained that, in her view, an enforcement agency's willingness "to take large financial institutions all the way to trial" is crucial to retain "leverage in settlement negotiations" and to avoid "settl[ing] on terms that are much more favorable to the wrongdoer." Senator Warren raised this issue with Comptroller of the Currency Thomas J. Curry at a previous hearing.

Banned by the SEC

The Second Circuit, in *SEC v. Bankosky*, reaffirmed the standard for banning an individual from serving as an officer or director, set forth in the court's 1995 decision of *SEC v. Patel*. At that time, the SEC was directed to issue such a ban "if the person's conduct demonstrates a substantial unfitness to serve as an officer or director." But the subsequent Sarbanes-Oxley Act of 2002 removed the word "substantiatial" from the statute. The Second Circuit ruled the Patel factors should still govern the analysis even though "'unfitness' is clearly a lower hurdle than 'substantial unfitness.'"

Related practice areas:

White Collar Defense and Internal Investigations

For further information about how Day Pitney can assist you with government or internal investigations, please contact any of the following attorneys:

James R. DeVita NY
jdevita@daypitney.com
(212) 297 2429

David J. Elliott CT
djelliott@daypitney.com
(860) 275 0196

Helen Harris CT, NY
hharris@daypitney.com
(203) 977 7418

Dennis T. Kearney NJ
dkearney@daypitney.com
(973) 966 8039

Elizabeth A. Latif CT, MA
elatif@daypitney.com
(860) 275 0166

Mark Salah Morgan NJ
mmorgan@daypitney.com
(973) 966 8067

John J. O'Reilly NJ
joreilly@daypitney.com
(973) 966 8043

Kenneth W. Ritt CT
kwritt@daypitney.com
(203) 977 7318

Denise R. Rosenhaft NJ, NY
drosenhaft@daypitney.com
(973) 966 8224

Stanley A. Twardy Jr. CT, DC
satwardy@daypitney.com
(203) 977 7368

Daniel E. Wenner CT, MA, NY
dwenner@daypitney.com
(860) 275 0465

A Conflict Over Conflict Minerals

The U.S. District Court for the District of Columbia will hear arguments on cross-motions for summary judgment in litigation between the National Association of Manufacturers (NAM) (and others) and the SEC regarding conflict-mineral-reporting rules established by the SEC. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required the SEC to enact rules for public companies to disclose their use of "conflict minerals," i.e., tantalum, tin, gold or tungsten, from the Democratic Republic of the Congo and surrounding countries. The SEC rules require disclosures to begin in 2014 for the use of such minerals during 2013, and the NAM has sued to enjoin the rules. The plaintiffs allege the cost-benefit analysis in the rule-making was grossly inadequate, the SEC misinterpreted Section 1502 and the rule violates companies' First Amendment rights.

No Such Thing As Too Big to Jail

During testimony before a House Financial Services subcommittee, acting Assistant Attorney General Mythili Raman dispelled the notion that the U.S. Department of Justice (DOJ) considered some financial firms "too big to jail." Ms. Raman began by saying "that no individual and no institution is immune from prosecution. Size does not equal immunity." Despite that statement, subcommittee members pressed Ms. Raman about whether the size of financial firms and the possible "collateral consequences" of a prosecution against them cause the DOJ to go easy on them. Ms. Raman said that "collateral consequences" of a prosecution are but one of the factors laid out in the U.S. Attorneys' Manual that prosecutors use when making charging decisions. For more on Ms. Raman's testimony, click here.

About Day Pitney LLP

Day Pitney LLP is a full-service law firm with more than 300 attorneys in Boston, Connecticut, New Jersey, New York and Washington, DC. The firm offers clients strong corporate and litigation practices, with experience on behalf of large national and international corporations as well as emerging- and middle-market companies and individuals.

Lawyers in our White Collar Defense and Internal Investigations practice have the resources, skills and experience necessary to protect our clients' interests whenever they are confronted by a government investigation, whether at the local, regional, national or international level. Our clients include Fortune 50 corporations, private companies, universities, hospitals and individuals. We have also conducted comprehensive and conclusive internal investigations for our clients and have helped them strengthen their regulatory compliance programs and ethics plans.