

June 24, 2010

White Collar Roundup, June 2010

Just the Facts, Ma'am. Just the Facts.

DOJ Fraud Chief [Denis McNerney recently outlined](#) what he views as three key steps to "successfully represent" corporations in government investigations:

- Lawyers must "establish and maintain credibility" with DOJ
- Lawyers must consider making voluntary disclosures to DOJ
- Lawyers should cooperate fully with the investigation

Nothing can guarantee success, but McNerney stressed the importance of full cooperation: "The bottom line is, get us the facts. That is what cooperation is all about. If you do that you'll get credit for cooperation, and if you don't, you won't get that credit."

No Rest for the Weary for SEC Litigation

There have been a recent spate of denials of motions filed by the SEC to stay civil enforcement actions filed simultaneously with DOJ criminal actions. [According to](#) acting Deputy Assistant Attorney General Greg Andres, these are "[interesting times](#)." Typically, when the SEC and DOJ conduct parallel investigations, the two agencies try to file actions at the same time. Often, because the SEC action is civil, susceptible to civil discovery, the parties ask the court to stay that case until the criminal matter is resolved. In some [courts](#), the agencies seek to relate cases to one judge to increase the chance of a stay; in other [courts](#), that option is unavailable. The takeaway: to avoid getting scooped, DOJ may [push for short trial dates](#).

A New Weapon To Report Healthcare Fraud

The Department of Health and Human Services Office of Inspector General created a [Hotline website](#) to improve the public's ability to report healthcare fraud. OIG [reports](#) it received about 125,000 phone complaints and roughly 17,000 e-mail complaints last year, which it hopes to increase with the implementation of the website.

A Cash Incentive for Whistleblowers

Section 922 of the [Restoring American Financial Stability Act](#) of 2010, which is in conference, would reward employees who blow the whistle on securities violations with up to 30% of any monetary penalties over \$1 million. If it becomes law, this change will create a cash incentive for whistleblowers (similar to the [False Claims Act](#)) to report wrongdoing.

The Devil Is Now in the (Individual) Details

Attorney General Eric Holder issued a [memorandum](#) to all federal prosecutors regarding the DOJ policy on charging and sentencing. The memo loosened some of the restraints placed on prosecutors by the now-superseded [Ashcroft Memo](#), which instructed prosecutors to seek an indictment for the highest, most readily provable offense and to pursue a sentence within the applicable Guidelines range. In contrast, while the Holder Memo has similar instructions, it invites prosecutors to consider

"an individualized assessment of the facts and circumstances of each particular case" when making charging and sentencing decisions.

Double Your Prosecution, Double Your Jeopardy

The [en banc](#) Third Circuit held in [United States v. Rigas](#) that when the government brings charges under [18 U.S.C. § 371](#), a "successive prosecution" relating to the same scheme constitutes double jeopardy in violation of the [Fifth Amendment](#). In [Rigas](#), the U.S. Attorney's Office for the Southern District of New York indicted the defendants for a wide-ranging scheme to defraud Adelphia Communications Corporation in violation of § 371. Subsequently, the U.S. Attorney's Office for the Middle District of Pennsylvania indicted them for conspiracy to defraud the United States under the same statute. The en banc Third Circuit ruled the second indictment was barred as double jeopardy.