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White Collar Crime Report™

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SECURITIES FRAUD

White Collar Crime and Securities Enforcement: 2012 in Review

BY BROOK DOOLEY AND ERIC H. MACMICHAEL

Prosecution and defense counsel could each find something to cheer in 2012, as both sides won important white collar and securities cases. The government won a significant criminal antitrust trial arising out of the LCD panel investigation, prevailed in a string of insider trading cases, and secured large civil settlements and other resolutions with banks related to the financial crisis. Yet defendants won their own share of Securities and Exchange Commission actions arising out of the financial crisis, a major Foreign Corrupt Practices Act trial, and the John Edwards public corruption trial.

Brook Dooley is a partner at the San Francisco litigation firm Keker & Van Nest LLP. He handles white collar criminal matters and complex civil litigation involving securities fraud, breach of contract, breach of fiduciary duty, and professional negligence claims. Dooley has represented numerous clients facing federal investigation or indictment, including the recent defense of Citigroup Executive Brian Stoker in a Securities and Exchange Commission enforcement action.

Eric MacMichael is also a partner at Keker & Van Nest. With extensive experience handling white-collar criminal and complex civil litigation matters, he represents individuals and companies under investigation or indictment for offenses including insider trading, banking-related crimes, antitrust, and tax evasion. MacMichael litigates matters throughout the United States and has tried cases to verdict in many state and federal courts and before arbitration panels.

This article highlights some of 2012's key white collar and securities enforcement actions and identifies cases to watch in 2013.

Foreign Corrupt Practices Act

Coming on the heels of the Department of Justice's loss in the *Lindsey Manufacturing* case, 2012 was another difficult year in the courtroom for prosecutors seeking convictions under the Foreign Corrupt Practices Act. The most notable failure was the ''Africa Sting'' case, which arose out of an undercover arms industry investigation.[1] As part of the investigation, government officials attended an annual trade show in Las Vegas and posed as representatives of the Gabon government. DOJ alleged that the defendants agreed to bribe the undercover agents to secure contracts to sell body armor, weapons, and other military gear.

After trying 10 defendants in two separate trials, the government failed to obtain a single conviction. In July 2011, Judge Richard J. Leon of the U.S. District Court for the District of Columbia declared a mistrial in the first trial involving four defendants. In January 2012, at the conclusion of a second trial involving six different defendants, two of the six were acquitted, and Judge Leon declared a mistrial after the jury deadlocked on the other four. The court also dismissed the conspiracy count as to all six defendants. In February, the government dismissed the indictments against all 19 defendants. Finally, in March, the government agreed to dismiss the charges against three defendants who pleaded guilty. In the end, Leon called the prosecution ''a long

[1] 07 WCR 143 (2/24/12). *United States v. Goncalves*, No. 1:09-cr-00335 (D.D.C. Feb. 21, 2012).

and sad chapter in the annals of white collar criminal enforcement.''

Guidance. An FCPA issue to watch in 2013 is what effect, if any, DOJ's and the Securities and Exchange Commission's guidance, *Resource Guide to the U.S. Foreign Corrupt Practices Act*, has on enforcement activity. Issued in November, the guide purports to provide a comprehensive set of rules and examples for conducting business in a foreign country. However, the general consensus among practitioners has been that the guide contains no new policy pronouncements and provides little guidance on the tougher compliance questions.[2] Below is a summary of what the guide says—and what it does not.

- *Corporate Compliance Programs*: The guide provides a list of ''Hallmarks of Effective Compliance Programs,'' a summary of compliance elements listed in prior publications and settled enforcement actions. Notably, the guide does not adopt a compliance defense, but it does state that DOJ ''may decline to pursue charges against a company based on the company's effective compliance program.''

- *Books and Records Provision*: The guide confirms that a books-and-records provision of the FCPA is separate and distinct from the bribery provision and that it applies where the company's books and records do not accurately reflect the company's transactions, assets, and liabilities.

- *Permissible Expenditures on Gifts, Travel, and Entertainment*: The guide provides several examples where a company can pay for gifts, travel, and entertainment without violating the FCPA, and it provides a framework for distinguishing between corrupt payments and acceptable corporate generosity.

- *Credit for Voluntary Disclosure*: Most notably, the guide does not provide clear guidance on the quantum of leniency companies should expect to receive from voluntarily disclosing FCPA violations. Instead, the guide repeats many of the general considerations listed in previous guidance and repeats the common warning that ''DOJ and SEC place a high-premium on self-reporting.''

- *Intent Requirement for Corporate Liability*: Defense counsel have argued in several recent cases that corporate criminal liability under the FCPA requires ''willful'' conduct by individuals. The guide rejects that position, stating, ''Proof of willfulness is not required to establish corporate criminal or civil liability, though proof of corrupt intent is.'' The guide does not, however, provide any useful guidance on how ''corrupt intent'' is measured.

- *Agency Liability*: While many hoped that the guide would clarify the circumstances under which a corporate parent can be held liable for the acts of its subsidiary, no such guidance was provided. The guide merely states that a parent company may be held liable for the violations of its subsidiary under ''traditional agency principles'' even if the parent is not directly involved in the underlying violation.

[2] 07 WCR 871 (11/16/12).

Antitrust

2012 was a good year for DOJ's Antitrust Division, highlighted by price-fixing convictions in the AU Optronics Corp. case, the only criminal case arising out of the government's long LCD panel industry investigation to go to trial.[3] After an eight-week trial before Judge Susan Illston that featured testimony about monthly meetings of LCD suppliers, referred to as ''Crystal Meetings,'' the jury took seven days to reach its verdict. The jury convicted AU Optronics, a Taiwanese company, its American subsidiary, and two senior executives, Hsuan B. Chen, AUO's president and chief operating officer, and Hui Hsuing, the company's executive vice president of sales, of violating Sherman ActSection 1.[4]

At sentencing, Illston rejected the government's request for a $1 billion fine on AUO, instead imposing a $500 million fine, which she deemed ''adequate but not excessive'' in light of the substantial costs already imposed on the company.[5] Each individual defendant was fined and sentenced to 36 months in prison, substantially longer sentences than those received by the individual defendants who pleaded guilty in the LCD panel investigation.

The jury also acquitted two less-senior executives and hung as to Steven Leung, head of the company's computer monitor division. Leung was subsequently convicted in December after a three-week retrial.[6]

Public Corruption

Following the report of DOJ's internal investigation into the prosecution of Sen. Ted Stevens (R-Alaska), released in March, DOJ's Public Integrity Division failed to redeem itself in the case of former Sen. John Edwards (D-N.C.), tried before Judge Catherine C. Eagles in the Middle District of North Carolina. DOJ indicted Edwards on five counts of violating federal campaign finance laws and one count of conspiracy on the theory that his image as a devoted husband was integral to his 2008 presidential campaign.[7] The government alleged that, after Edwards's mistress became pregnant, he accepted approximately $1 million from wealthy donors to hide her from the media and improperly failed to disclose these payments as campaign contributions.

Edwards's defense centered on the argument that the funds were not political contributions but simply a way for friends to help him hide his affair. The central question in the case, therefore, was whether the donors gave the money with the ''purpose to influence an election.'' Over Edwards's objection, the court instructed the jury that ''the government does not have to prove that the sole or only purpose of the money was to influence the election.'' Despite losing on the instruction point, Edwards was acquitted on one count and the jury deadlocked on the remaining counts. In June, DOJ dismissed the remaining charges against Edwards.[8]

[3] *United States v. Lin*, No. 3:09-cr-00110 (N.D. Cal., March 13, 2012).
[4] 07 WCR 242 (3/23/12).
[5] 07 WCR 765 (10/5/12).
[6] 07 WCR 981 (12/28/12).
[7] *United States v. Edwards*, No. 1:11-cr-00161 (M.D.N.C., May 31, 2012).
[8] 07 WCR 469 (6/15/12).

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Intellectual Property Crimes

Two important cases were decided in 2012 regarding crimes related to corporate intellectual property. In *United States v. Nosal*, the en banc U.S. Court of Appeals for the Ninth Circuit limited the reach of the Computer Fraud and Abuse Act.[9] Nosal was charged under the CFAA after he persuaded his former co-workers to provide information taken from the company's computer network. Company policy authorized employees to access the company's network and the information stored on it, but it prohibited them from disclosing information stored on the network to third parties. The key question before the court was whether the employees ''exceed[ed] authorized access'' as that phrase is used in CFAA.

The Ninth Circuit affirmed the trial court's dismissal of the CFAA charges, stating, ''Basing criminal liability on violations of private computer use polices can transform whole categories of otherwise innocuous behavior into federal crimes simply because a computer is involved.''[10] The court held that ''exceeds authorized access'' as used in CFAA is ''limited to violations of restrictions on *access* to information, and not restrictions on its *use*.''[11]

The day after the Ninth Circuit's ruling in *Nosal*, the Second Circuit released its opinion in *United States v. Aleynikov*, in which the court overturned Sergey Aleynikov's conviction under the National Stolen Property Act (NSPA) and the Economic Espionage Act of 1996 (EEA).[12] Aleynikov, a Goldman Sachs programmer, was hired away by a competitor and paid to develop a computerized trading system. Prior to leaving Goldman, Aleynikov downloaded 32 megabytes of computer code from Goldman's computers and sent it to a server in Germany with the intent that it would be used by his new employer.

At trial, Aleynikov argued that he intended to use only the portions of the downloaded code that were ''open source,'' or freely available. The government argued that Goldman required its employees to sign a confidentiality agreement as part of their employment and that any software created by them in their jobs was the property of the investment bank. The Second Circuit set aside Aleynikov's conviction, finding that source code alone is not a ''product'' for purposes of the EEA or a ''good, ware, or merchandise'' for purposes of the NSPA.[13]

However, Aleynikov's relief was short-lived. Soon after the Second Circuit's decision, the Manhattan District Attorney's Office decided to prosecute him under state law.[14]

Sentencing

The U.S. Supreme Court's 2011 term was light on white collar cases, but the court did issue an *Apprendi* opinion relevant to practitioners. In *Southern Union Co. v. United States*,[15] the court held that the rule established in *Apprendi v. New Jersey*[16]—that the Sixth Amendment's jury-trial guarantee requires that any fact (other than the fact of a prior conviction) that increases the maximum punishment authorized for a particular crime be proved to a jury beyond a reasonable doubt—applies to the imposition of criminal fines.

A jury convicted Southern Union Co. of storing liquid mercury without a permit in violation of the Resource Conservation and Recovery Act. The punishment for an organizational defendant is ''a fine of not more than $50,000 for each day of violation.'' Southern Union contended that the court's instructions allowed the jury to convict even if it found only a one-day violation and that, under *Apprendi*, the maximum fine the court could impose was $50,000. The district court disagreed and imposed a fine of $6 million, concluding that the verdict form supported a finding that the violation continued for longer than one day. On appeal, the First Circuit affirmed the sentence on the ground that *Apprendi* does not apply to criminal fines.

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The Supreme Court reversed. Justice Sonia Sotomayor, writing for the majority, stated that so long as a fine is not ''so insubstantial that the underlying offense is considered 'petty,' '' the Sixth Amendment right to jury trial requires a jury, not a judge, to determine facts that could increase a criminal fine above the amount warranted by the jury's verdict alone.[17]

There are two sentencing cases on the Supreme Court's docket to be decided in 2013. In *Peugh v. United States*[18], the justices will hear the case of an Illinois businessman convicted of bank fraud who argues that his 70-month prison sentence violates the Constitution's Ex Post Facto Clause. The central question before the court is whether a sentencing judge should apply the version of the U.S. Sentencing Guidelines in effect at the time the crime occurred or the version in force at the time of the sentencing. Oral argument is set for Feb. 26.

The court will also decided *Alleyne v. United States*,[19] where it will consider whether to overrule its prior decision in *Harris v. United States*.[20] *Harris* held that the Constitution does not require facts that increase a mandatory *minimum* sentence to be determined by a jury. The key issues in *Alleyne* are the continuing validity of *Harris* and whether *Apprendi* will be expanded beyond facts that increase a sentence beyond the maximum set forth in the statute. Oral argument was heard Jan. 14.

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[9] 676 F.3d 854, 07 WCR 311 (9th Cir. 2012).
[10] Id. at 860.
[11] Id. at 863-64 (emphasis in original).
[12] 676 F.3d 71, 07 WCR 324 (2d Cir. 2012).
[13] Id. at 76-77, 79-80.
[14] 07 WCR 655 (8/24/12).
[15] 07 WCR 499 (6/29/12).
[16] 530 U.S. 466 (2000).
[17] *Southern Union* at 2351.
[18] 675 F.3d 736, 07 WCR 326 (7th Cir.), cert. granted Nov. 9, 2012, No. 12-62.
[19] 457 Fed. Appx. 348 (4th Cir. 2011), cert. granted Oct. 5, 2012, No. 11–9335.
[20] 536 U.S. 545 (2002).

Securities Fraud

The results were mixed for DOJ and the SEC in their securities fraud enforcement actions in 2012. On the one hand, DOJ continued to achieve success in prosecuting insider trading claims, winning convictions in three high-profile cases. On the other hand, the government achieved more mixed results in cases arising out of the recent financial crisis.

Insider Trading. Three significant insider trading cases went to trial in 2012, headlined by the government's successful prosecution of Rajat Gupta, the former head of McKinsey & Co. and board member of Goldman Sachs and Procter & Gamble.[21] In June, after a trial before Judge Jed S. Rakoff in the Southern District of New York, the jury concluded that Gupta provided confidential information regarding Goldman to Galleon Group head Raj Rajaratnam, who was convicted of insider trading in May 2011 and sentenced in October 2011 to 11 years in prison.[22] Gupta was convicted of three counts of securities fraud and one count of conspiracy; he was acquitted on two other counts of securities fraud. The case is now on appeal.[23]

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Evidence of telephone conversations recorded pursuant to Title III wiretaps in the Rajaratnam investigation played a large role at the Gupta trial. Prior to trial, Gupta argued that the government's wiretap evidence should be suppressed because Title III does not authorize the use of wiretaps in insider trading cases and because the government's application for the wiretap on Rajaratnam's cellphone failed to provide a ''full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried'' so that the authorizing court could determine the necessity of a wiretap, as required by Title III.

Largely hewing to Judge Richard J. Holwell's order in the Rajaratnam case,[24] Rakoff denied Gupta's suppression motion. Rakoff held that the wiretap of Rajaratnam's telephone was permitted because the government had ''the 'bona fide' purpose of investigating wire fraud, an offense for which Title III does permit wiretapping.''[25] Furthermore, Rakoff held that the omissions from the wiretap application were not material under *Franks v. Delaware*, 438 U.S. 154 (1978), rejecting Gupta's argument that violations of Title III necessitate suppression under Title III's exclusionary rule, 18 U.S.C. § 2518(10)(a), without regard to materiality.

The questions of whether Section 2518(10)(a) or the *Franks* standard governs motions to suppress Title III wiretaps and whether the Rajaratnam wiretaps should have been suppressed under either standard are now before the Second Circuit in the Rajaratnam appeal.[26] This will be a case to watch in 2013, as a ruling in Rajaratnam's favor could imperil the Gupta conviction and potentially others as well.

Many commentators also noted Rakoff's sentencing memorandum and order in the Gupta case.[27] Rakoff issued a pointed criticism of the emphasis placed on loss in calculating securities fraud sentences under the Sentencing Guidelines. He noted that ''the Sentencing Guidelines assign just 2 points to Mr. Gupta for his abuse of a position of trust—the very heart of his offense—yet assign him no fewer than 18 points for the resultant but unpredictable monetary gains made by others, from which Mr. Gupta did not . . . receive one penny.'' Applying the 18 U.S.C. § 3553(a) factors, rather than the guidelines, Rakoff sentenced Gupta to two years' imprisonment and a $5 million fine.[28]

California Hedge Fund Manager. The government obtained a second insider trading conviction in Rakoff's courtroom in August, when a jury convicted Douglas Whitman, founder and head of California-based Whitman Capital LLC, of two counts of securities fraud and two counts of conspiracy.[29] Whitman was convicted of trading on information regarding Marvell Technology Group Ltd., Polycom Inc., and Google Inc. provided to him by two intermediaries who obtained the information from company insiders. In addition to wiretap recordings, the government offered the testimony of the intermediaries who passed the inside information to Whitman and who had pleaded guilty and agreed to cooperate against Whitman.

In a notable opinion issued after trial, Rakoff formalized three rulings he had made at the charging conference on unresolved issues in insider trading cases.[30] First, Rakoff held that ''the scope of an employee's duty to keep material non-public information confidential is defined by federal common law'' and not state law. Second, the judge held that, in a criminal insider trading case premised on the ''classical theory''—where a corporate insider discloses information about his or her employer in breach of a duty owed to the company and its shareholders—the government must prove that a remote tippee had ''a general understanding that the inside information was obtained from an insider who breached a duty of confidentiality in exchange for some personal benefit, although the tippee need not know the details of . . . the . . . benefit the insider received.''[31] Third, Rakoff held that, in a criminal case involving a remote tippee who receives material nonpublic information from a corporate insider, the government must prove that the defendant had ''a specific intent to de-

[21] 07 WCR 500 (6/29/12). *United States v. Gupta*, No. 1:11-cr-00907 (S.D.N.Y., June 15, 2012).
[22] 06 WCR 865 (10/21/11).
[23] 07 WCR 949 (12/14/12).
[24] 05 WCR 833 (12/3/10). *United States v. Rajaratnam*, No. 1:09-cr-1184 (S.D.N.Y., Nov. 24, 2010).
[25] 07 WCR 274 (4/6/12). *United States v. Gupta*, No. 1:11-cr-00907, Docket No. 42 (S.D.N.Y. March 27, 2012).
[26] 07 WCR 824. *United States v. Rajaratnam*, No. 11-4416 (2d Cir., filed Oct. 25, 2011).
[27] *United States v. Gupta*, No. 1:11-cr-00907, Docket No. 127 (S.D.N.Y. Oct. 24, 2012).
[28] 07 WCR 823 (11/2/12).
[29] 07 WCR 659 (8/24/12). *United States v. Whitman*, No. 1:12-cr-00125 (S.D.N.Y., Aug. 20, 2012).
[30] 07 WCR 925. *United States v. Whitman*, No. 1:12-cr-00125 (S.D.N.Y., Nov. 14, 2012).
[31] Id.

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fraud the company to which the information relates . . . of the confidentiality of that information.''[32]

Rakoff's opinion in *Whitman*—and the Second Circuit's decision in *Securities and Exchange Commission v. Obus*, 693 F.3d 276 (2d Cir. 2012), which addressed similar issues related to the knowledge required of a tippee in an insider trading case—demonstrate that the law with respect to insider trading continues to develop.

Portfolio Managers. The year closed out with a third conviction in an insider trading case when Anthony Chiasson, a former portfolio manager and co-founder of Level Global Investors LP, and Todd Newman, a former portfolio manager at Diamondback Capital Management LLC, were convicted of securities fraud and conspiracy after a four-week trial in front of Judge Richard J. Sullivan in the Southern District of New York.[33] The evidence at trial showed that a group of analysts collected and shared information regarding financial results obtained from insiders at Dell Inc. and NVIDIA Corp. and passed that information to Chiasson and Newman. The trial focused on whether Chiasson and Newman knew the source of the information they received. The government did not have the benefit of wiretap recordings of the defendants, but it had two cooperating analysts who testified that they passed along inside information to Chiasson and Newman and that the two defendants knew the source of the information. Sentencing is set for April 19.

Interest in the Chiasson/Newman trial was heightened because of the defendants' connections to SAC Capital Advisors, the hedge fund run by billionaire Steven A. Cohen. Both Level Global and Diamondback Capital were started by former SAC traders.

In November, DOJ charged Mathew Martoma, a former SAC portfolio manager, with trading on inside information regarding an Alzheimer drug's clinical trial results obtained from a doctor on the committee overseeing the trial.[34] Martoma pleaded not guilty Jan. 3.[35]

In 2013, practitioners will be watching the Martoma case for potential DOJ or SEC actions against SAC.

Financial Crisis Cases

The government had much less success in 2012 in cases against individual defendants arising out of the financial crisis. In July, a jury cleared Brian Stoker, a former Citigroup employee who worked in the bank's collateralized debt obligation (CDO) group, of negligence-based allegations in connection with a CDO known as Class V Funding III.[36] The SEC alleged that Stoker failed to disclose that Citigroup—and not the CDO's asset manager—had selected certain of the residential mortgage-backed securities (RMBS) underlying the CDO or that Citigroup had retained short positions on those underlying assets. Comments to the media after the trial indicated that the jury viewed Stoker as a scapegoat who was unfairly singled out.

In November, the SEC suffered a defeat in another case arising out of the CDO business, choosing to drop its case against Edward Steffelin, who worked for the investment advisory arm of GSC Capital.[37] The SEC alleged that Steffelin had failed to disclose to investors that the hedge fund Magnetar Capital—and not GSC—had selected the RMBS underlying a CDO marketed by J.P. Morgan Securities in 2007 or that Magnetar had short positions on some of those underlying assets. In dismissing its case against Steffelin, the SEC cited evidence that came to light during its investigation.

In 2013, practitioners will be watching *Securities and Exchange Commission v. Tourre*, the SEC's remaining case against an individual related to the CDO boom.[38] Much like in *Stoker* and *Steffelin*, the SEC alleges that Fabrice Tourre, a former Goldman Sachs banker, failed to disclose that the hedge fund Paulson & Co. played a significant role in selecting the RMBS underlying a CDO marketed by Goldman in 2007 or that Paulson effectively took short positions on the underlying assets in the CDO. The case is set for trial in July, and the question will be whether the SEC can reverse its trend of defeats in cases against individuals arising out of the financial crisis.

SEC's No Admit, No Deny Policy. DOJ and the SEC had greater success in 2012 bringing—and settling—actions against banks and other corporate entities for conduct related to the financial crisis. For example, in November the SEC and J.P. Morgan entered into a settlement related to J.P. Morgan's disclosures regarding certain RMBSs issued in late 2006, as well as RMBS-related disclosures by Bear Stearns, which was acquired by J.P. Morgan in October 2008.[39] The settlement, which has yet to be approved, recites only negligent conduct and calls for J.P. Morgan to pay nearly $300 million in disgorgement and penalties.

In its settlement with the SEC, J.P. Morgan neither admitted nor denied the conduct alleged in the SEC's complaint. The SEC's long-standing practice of entering into such settlements garnered much attention in 2012, after the Second Circuit took up the appeal of Judge Rakoff's November 2011 decision withholding approval of the SEC's settlement with Citigroup in connection with the Class V Funding III CDO at issue in the *Stoker* case. Rakoff refused to approve the settlement primarily on the grounds that it contained no admission and no other factual basis to determine whether it met the ''fair, reasonable, and adequate'' standard.[40] The SEC and Citigroup appealed and asked the Second Circuit to stay Rakoff's order setting the case for trial. In March, a motions panel of the Second Circuit stayed the proceedings in the district court, concluding that the parties had made a strong showing of a likelihood of success in setting aside Rakoff's order.[41] While the mo-

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[32] Id.

[33] 07 WCR 981. *United States v. Newman*, No. 1:12-cr-00121 (S.D.N.Y., Dec. 17, 2012).

[34] 07 WCR 913 (11/30/12).

[35] 08 WCR 6. *United States v. Martoma,* No. 1:12-cr-00973 (S.D.N.Y.).

[36] *Securities and Exchange Commission v. Stoker*, No. 1:11-cv-07388 (S.D.N.Y., July 31, 2012).

[37] *Securities and Exchange Commission v. Steffelin*, No. 1:11-cv-04204 (S.D.N.Y., Nov. 16, 2012).

[38] *Securities and Exchange Commission v. Goldman Sachs & Co.*, No. 1:10-cv-03229 (S.D.N.Y., filed April 16, 2010).

[39] *Securities and Exchange Commission v. J.P. Morgan Securities LLC*, No. 1:12-cv-01862 (D.D.C., Jan. 7, 2013).

[40] 06 WCR 1015. *Securities and Exchange Commission v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y., Nov. 28, 2011).

[41] 07 WCR 256. *Securities and Exchange Commission v. Citigroup Global Markets Inc.*, 673 F.3d 158 (2d Cir., March 15, 2012).

tions panel's decision does not bind the merits panel, the decision was a strong signal that the SEC's practice of entering into ''no admit, no deny'' settlements will survive.

The Second Circuit has scheduled oral arguments for Feb. 8.[42]

Other Actions

In another high-profile settlement, the government in December announced an agreement with UBS AG to resolve claims related to the manipulation of benchmark interest rates, including the London InterBank Offered Rate, known as LIBOR. The broad agreement included a civil settlement with the Commodity Futures Trading Commission and a nonprosecution agreement between DOJ and UBS. Notably, the agreement also included a guilty plea by UBS's Japanese subsidiary. DOJ simultaneously unsealed a criminal complaint against two employees of UBS's Japanese subsidiary.[43] This case may signal a greater willingness to pursue individual defendants for conduct stemming from the financial crisis and is one that practitioners will be watching in 2013.

The Supreme Court's decision in *Gabelli* could have far-reaching effects on the SEC's ability to bring fraud actions—against both individuals and institutions—in the future.

Practitioners will also be keeping an eye on *Gabelli v. Securities and Exchange Commission* in the Supreme Court. In *Gabelli*, the justices have been asked to decide whether under 28 U.S.C. § 2462, which provides a five-year statute of limitations for civil penalty actions brought by the government, a claim accrues at the time the government can bring the claim or whether accrual is governed by the ''discovery rule,'' which delays accrual until the plaintiff has discovered, or reasonably should have discovered, the cause of action.

In a complaint filed in 2008, the SEC alleged that the defendants engaged in fraudulent activity related to so-called ''market timing'' in violation of the Investment Advisors Act, the Securities Act, the Securities Exchange Act, and Rule 10b-5. In the district court, the defendants successfully argued that the SEC's claims were time-barred under Section 2462's five-year statute of limitations because the conduct at issue occurred prior to 2002.

The Second Circuit reversed, holding that ''for claims that sound in fraud a discovery rule is read into the relevant statute of limitation.''[44] The Supreme Court's decision in *Gabelli* could have far-reaching effects on the SEC's ability to bring fraud actions—against both individuals and institutions—in the future.

[42] 08 WCR 19 (1/11/13).

[43] 07 WCR 975. *United States v. Hayes*, No. 1:12-mj-03229 (S.D.N.Y., filed Dec. 12, 2012).

[44] *Securities and Exchange Commission v. Gabelli*, 653 F.3d 49, 60 (2d Cir. 2011), cert. granted Sept. 25, 2012, No. 11-1274.

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