# 2015 Roundtable Series

# White-Collar Defense

The latest developments in white-collar criminal law include a game-changing decision on insider trading, new sentencing guidelines for fraud convictions, more options for filing charges under the bank fraud statutes, and a big heads-up from the Department of Justice on health care billing. Meanwhile, long-term trends are producing more administrative hearings from the Securities and Exchange Commission and the virtual death of joint defense for corporations and their insiders.

Sharing their knowledge on these topics were roundtable participants Timothy P. Crudo of Coblentz Patch Duffy & Bass; Eugene Illovsky of Morrison & Foerster; John F. Libby of Manatt, Phelps & Phillips; and Kyle Waldinger of the U.S. Attorney's Office, Northern District of California. The roundtable was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

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## EXECUTIVE SUMMARY

**MODERATOR: Late last year, two hedge fund managers had their insider trading convictions overturned by the U.S. Court of Appeals for the Second Circuit in *U.S. v. Newman*, No. 13-1837 (Dec. 10, 2014). What was the rationale, and will there be a continuing impact?**

**TIMOTHY P. CRUDO:** The *Newman* defendants were remote tippees convicted of insider trading. Depending on how you count, they were three or four links in the chain removed from the original tipper. The trial court instructed the jury that, to convict, the tippees had to have known the original insider had disclosed the information in breach of a fiduciary duty owed to the shareholders. The defendants asked for an additional instruction saying the tippees also had to have known that the initial tipper had received a personal benefit for the tip, but the court declined to give that instruction.

On appeal, the Second Circuit said that knowledge of a personal benefit is a required element of the government's proof. Given the Second Circuit's prominence as the hub of insider trading cases, it's a very significant decision.

A second, more unexpected element of *Newman* was the court's discussion of what constitutes a personal benefit in the first place. It has generally been thought that the bar is pretty low. You don't need a suitcase full of cash, or Super Bowl tickets, or other information changing hands—just that warm and fuzzy feeling you get from giving a gift is sufficient for personal benefit. But the Second Circuit said the bar is not quite so low.

**EUGENE ILLOVSKY:** The court noted that the personal benefit received by the insider must be "of some consequence," which I take to mean a tangible benefit. Who knows what that means, but it quite likely rules out the "warm and fuzzy" stuff that used to be sufficient.

**CRUDO:** The Supreme Court case the Second Circuit relied on, *Dirks v. SEC*, 463 U.S. 646 (1983), requires only a "personal" benefit. And now the Second Circuit has suggested that it's got to be tangible and maybe even pecuniary. We're going to see a lot more skirmishing on this issue in and out of the Second Circuit. Because it impacts all cases involving tippees, even if they are not remote, this aspect of the decision could wind up being more significant than the knowledge issue that initially got all of the attention.

**KYLE WALDINGER:** On that point—and I should say the opinions I express today are my own and not necessarily those of the Department of Justice or the U.S. Attorney's Office where I work—I think Tim [Crudo]'s point is a good one. The opinion means that looking at downstream tippees will be a fact-dependent inquiry, and there are a lot of cases where the tippee is much closer to the tipper than in *Newman*. We will see more focus on what is the personal benefit that the tipper received, and some pushback on that from the defense bar.

**ILLOVSKY:** So the end result—and maybe

it's not a bad one—is that cases with more remote tippees may not be charged criminally, but will be handled by the Securities and Exchange Commission. And districts other than the Southern District of New York will get involved and start to flex their securities muscle.

**MODERATOR: So what are the ramifications if the SEC is avoiding the courts and using more administrative proceedings?**

**JOHN F. LIBBY:** This has been a hot issue since Dodd-Frank in 2010 expanded the SEC's ability to use administrative proceedings against all persons, not just those practicing before it or subject to their jurisdiction. A case was just filed in early January in federal court in the Eastern District of Wisconsin, *Bebo v. SEC*, challenging the SEC's use of administrative proceedings as being an unconstitutional violation of due process.

You have a situation where the SEC now can bring a proceeding where they have the full range of penalties available in district court, but they don't have to provide discovery to the defendant, they don't have to follow the rules of evidence, the case is heard by an SEC-paid administrative law judge, and there's no right to jury trial. And the cases are typically set for hearing on an expedited basis. It's going to be interesting to see how the *Bebo* case plays out and how criticism from the defense bar affects the SEC's filing decisions and use of this new power.

**ILLOVSKY:** It's a very interesting case. We know that SEC officials have been making speeches and certainly sending out the message that defense counsel can expect even greater use of administrative proceedings in these difficult cases. I'll be quite interested to see if *Bebo* gets any traction. I'm skeptical.

**CRUDO:** I agree. Defendants in several recent cases have made runs at opposing these proceedings but they've come up empty. But we've seen some comments, from U.S. District Court Judge Jed Rakoff in the Southern District of New York and others, expressing concern over the expanded powers John referred to and the sense that this may be a little unfair. That might be something Congress could latch onto.

**LIBBY:** It reminds me a bit of the push and pull ten years ago over the Thompson memo, where the perception was the Department of Justice overreached in requiring full waivers of privilege and saying corporations were not being cooperative if they paid the legal fees for individuals. A combination of pressure from the defense bar and the courts cut back on that overreach. It will be interesting to see if the same process plays out here.

**WALDINGER:** I expect Andrew Ceresney, who is now the sole director of the enforcement unit at the SEC, to use all the tools in his toolbox. And from what I can tell, these administrative proceedings are an important part of that. So I think we will continue to see them.

**MODERATOR: What about the DOJ's increased use of deferred prosecution and nonprosecution agreements?**

**ILLOVSKY:** The Justice Department has really stepped up its use of these agreements—there have been about 20 or more a year since 2006. And the amounts of money being paid in connection with DPAs and NPAs seem to be getting larger and larger. The resultant debate is quite interesting.

Some have said DOJ should promulgate standards on when a company will get a deferral or nonprosecution agreement as opposed to being indicted or there being a declination. Some think there should be more judicial oversight. There are also criticisms being voiced that smaller companies wind up having to take guilty pleas while larger companies can simply pay and get deferrals or nonprosecution agreements.

There was proposed legislation to impose some standards around deferrals and nonprosecution agreements, but it does not seem to have gone anywhere and the department has shown no signs of slowing down its use of DPAs and NPAs. It will be interesting to see whether Congress will ultimately step in, whether DOJ will self-correct, or if pressure will come from other quarters.

**WALDINGER:** Sometimes prosecutors see that certain tools in the toolbox haven't been used in a while and decide to put

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>
> —TIMOTHY CRUDO

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"I have found there is a lot of room for defense counsel in negotiating with the DOJ to minimize any unintended costs or effects of a corporate monitor."

—EUGENE ILLOVSKY

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them to use again. To the extent that there has been increased use of deferred prosecution and nonprosecution agreements with corporations, one reason may be that sort of cyclical relationship. I think people are still cognizant of the fact that prosecuting Arthur Andersen ten years ago had a major impact on the company and the people who worked there. Also, John [Libby] just talked about the Thompson memo, and the DOJ no longer has those strong tools for requiring corporations to waive privilege in order to go after individuals inside the company.

**LIBBY:** I think there's been an upside to the way the process has evolved with the Department of Justice over the years since the Arthur Andersen prosecution. For example, the McNulty factors as embodied in the U.S. Attorney's Manual are a very helpful framework for discussing with the department what the appropriate disposition of a corporate criminal investigation should be. And I think deferred prosecution agreements and nonprosecution agreements have been helpful, especially for those corporations in regulated industries who, frankly, can't afford to go to trial—where a criminal conviction is a death penalty.

On the other hand, there have been criticisms that the whole process has taken private what should be in the public record. You're trying your case as defense counsel to a prosecutor behind closed doors instead of in open court to a jury. And instead of a full development of a factual record, including documents and witness testimony, you have a highly negotiated statement of facts. A lot of what takes place in resolving cases involving corporations really kind of takes place out of the public view. As corporate counsel, I'm not sure that's a bad thing, but it has been a criticism.

**ILLOVSKY:** Do you get the feeling there are cases that, in another time and place would have been declinations, but now are pursued and just wind up as indistinguishable from civil settlements with the government—money payments just to make the investigation go away?

**LIBBY:** There's no doubt. Cases that 10, 15 years ago might have been resolved civilly or in a regulatory forum are now part of the discussion with criminal prosecutors, even if you end up with a nonprosecution agreement or a deferred prosecution agreement. But that I think is part of an overall trend, that what used to be regulatory and civil has gotten criminalized.

**MODERATOR: What about the use of corporate monitors as part of these agreements? Is that increasing?**

**LIBBY:** Anecdotally, my perception is that DOJ is not using them as frequently as they did, say, four or five years ago, maybe because there was some criticism as to how they were appointed and operated.

**CRUDO:** I have not seen many of them out there, but companies are very concerned by the idea of a monitor—an outsider coming in and injecting himself or herself into their business for some substantial period of time.

**ILLOVSKY:** I have found there is a lot of room for defense counsel in negotiating and working with DOJ on the role of the monitor and what precisely the monitor does—getting the department to appreciate precisely how the client's business works and to minimize any unintended costs or effects of a corporate monitor or any person who's appointed to perform some kind of auditing function. The Department of Justice has been fairly reasonable and receptive in those discussions.

**MODERATOR: Are internal corporate investigations a significant factor in how cooperation is judged by the government these days?**

**ILLOVSKY:** The focus now is on doing investigations that are geared toward finding individual responsibility. The Department of Justice has made clear that when it judges a corporation's claim for cooperation credit, or even evaluates its compliance program, it will consider whether that program or that investigation has been able to find culpable individuals and bring them to the department's attention. I view this as the next phase of what we have heard more and more from the DOJ, which is, "We're not doing a deal just with the company, we

want individuals." It's quite difficult to get a corporation-only deal these days, I find.

**LIBBY:** I would agree with that and take it a step further. It remains in the U.S. Attorney's Manual that in order to be considered for cooperation, a corporation should strongly consider waiving its privilege on facts discovered during the internal investigation. So when I conduct those types of investigations, I assume the facts are going to end up being disclosed to the Department of Justice both in the context of discussions to resolve the case as to the corporation and, as Eugene [Illovsky] said, to facilitate the department's investigation and prosecution of individuals. I'm not making any value judgment here, it's just a fact of life.

**CRUDO:** If you're the individual, you're now potentially dealing with adversaries in both the prosecutors and the company, which in your mind is looking for scapegoats, to put it pejoratively. There is concern that the company has to serve up some heads to the government—has to show it has taken a strong stance and disciplined people. Individuals are in a tough spot. They have to think hard about cooperating in an internal investigation when there is a real risk that what they say will be passed along to the government—which, as John [Libby] says, seems to be the presumption these days. At the same time, not cooperating with your employer is liable to get you fired.

**LIBBY:** It also makes you think twice as corporate counsel about doing joint defense agreements with individual employees, which even five or six years ago were more or less automatic.

**ILLOVSKY:** I find it hard to think of circumstances as a corporate counsel where I would ever use one today.

**MODERATOR: Next up, there are some initiatives out there proposing new sentencing guidelines for white-collar cases. What do these entail?**

**CRUDO:** The American Bar Association has a task force whose most recent draft guidelines came out for comment last May. Its proposal looks to streamline the fraud guidelines and scales back on the extent to which the amount of loss drives sentencing in white-collar cases. The numbers can get so high so quickly that, in the defense's view, they are disproportionate in scale with culpability.

**ILLOVSKY:** Particularly if you've done a securities fraud criminal case, the loss number immediately gets huge and becomes meaningless, and drives you into a stratospheric sentencing range that doesn't make any sense.

[*Editor's note:* On the same day as this roundtable, January 9, 2015, the U.S. Sentencing Commission voted to publish proposed amendments to guidelines Section 2B1.1 clarifying the definition of "intended loss," which contributes to the degree of punishment for fraud.]

**WALDINGER:** Everyone here on both sides of the table, we live and die by Section 2B1.1. But if you look at the equivalent guidelines sections from back in the late 1990s, those sections are shorter and more streamlined. Because 2B1.1 has gotten so big and complicated, there has been a lot of debate that it's not really doing what it needs to do for the judges. At the end of the day, what we're trying to do is come up with the right sentence and give some direction to other judges so that people who commit the same kinds of crimes get the same kind of punishment.

**CRUDO:** We've got a lot of new judges in the Northern District of California, with 11 of the 15 active judges appointed by President Obama. Sentencing is the most difficult thing a judge does, and a lot of the judgment needed to do it well comes from the experience of seeing and doing it a lot. These judges are all excellent lawyers, but for defendants who are on the front end of a new judge's learning curve, it's a scary place to be.

**WALDINGER:** Well, the guidelines are going to give the new judges some comfort as a place to start, and that's what the Supreme Court and the Ninth Circuit say you have to do. The guidelines are a starting point, and after the new judges get some

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> —JOHN LIBBY

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—KYLE WALDINGER

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experience, they'll have a better sense of whether to depart from the guidelines and, if so, how far above or below the guidelines they can go.

We have a senior judge here in the Northern District who didn't take criminal cases for many years but began taking them again within the last few years. The last time the judge sentenced, the guidelines were mandatory; now they are advisory. So it's been interesting to watch a very experienced judge operate in an advisory guidelines environment.

**LIBBY:** Within the last couple of years we probably have probably four or five new judges here in the Central District of California. And without commenting on any judge in particular, I would think that new judges might be inclined to stay within the guidelines because that is a safe zone until they get more experience with the sentencing process from that side of the bench.

The other thing I notice is that judges who are former U.S. Attorneys or Assistant U.S. Attorneys are usually the toughest on the U.S. Attorney's office. You hear critics saying it's unfortunate so many ex-prosecutors are appointed to the bench. But I think that actually ends up being a useful check on the U.S. Attorney's office.

**ILLOVSKY:** I've talked to prosecutors who share the view that if every crime gets some outrageously high sentence, the criminal law eventually loses an important part of its expressive function—its ability to reflect society's outrage about certain conduct.

**MODERATOR: Getting back to specific types of white-collar cases: Does the Supreme Court's ruling in *Loughrin v. United States*, No. 13–316 (June 23, 2014) mean the DOJ will bring more embezzlement cases under the bank fraud statute than under mail or wire fraud statutes?**

**WALDINGER:** I think this 9-0 decision written by Justice Kagan is great for the government. In *Loughrin*, the Supreme Court made clear that the second subsection of 18 U.S. Code Section 1344 didn't require an intent to defraud a bank. I see that clearing the way for more cases to be brought, certainly, under that section of the bank fraud statute, where there is a sufficient factual predicate.

There was a recent Ninth Circuit decision in *U.S. v. Jinian*, 11-10593 (July 23, 2013 [amended opinion]), which was brought as a wire fraud case. It involved embezzlement by the president of a software company here in the Bay Area, and the main issue on appeal was whether the wires, which were electronic images of checks sent in interstate commerce from the Federal Reserve Bank to various banks, were sufficient under the wire fraud statute. The Ninth Circuit held they were. But if that case had been brought under the bank fraud statute, the entire appeal would have been a nullity.

**ILLOVSKY:** In *Loughrin*, the Supreme Court also tried to allay concerns that the statute was going to be too broad; it focused on the "by means of" language and explained that phrase as a constraint on the statute. From a defense perspective, I was not convinced. We're going to need more litigation and more case law to flesh out "by means of."

**LIBBY:** Subsection 1344(2) also includes property under the custody or control of a financial institution, which I assume would include a customer deposit. If you have a telemarketing case where a boiler room is calling people up and taking their money by taking it out of their banks—and you otherwise don't have jurisdiction under the mail and wire fraud statutes—could that now be prosecuted under 1344(2)?

**WALDINGER:** It goes back to what Eugene [Illovsky] said about the "by means of" language. The Supreme Court talked in *Loughrin* about the misrepresentation being passed on to the bank through a forged or altered check. Perhaps where the litigation will be is, what other kinds of misrepresentations or frauds can be passed on to the bank that satisfy the "by means of" language in the statute? Can it be more than just a forged or altered check?

**MODERATOR: Speaking of banks, what has been the impact of the DOJ's Operation Chokepoint, which investigates financial institutions that do business with ultra-high-interest payday lenders?**

**LIBBY:** As regulated financial institutions, banks have an obligation to have adequate anti-money-laundering and other programs to make sure their facilities are not being used for improper, illegal purposes. It strikes me that Chokepoint was an effort to say to banks, "If you're not doing that job well enough, we're going to come after you." There was a lot of Congressional attention focused on Chokepoint, and some leaks of internal DOJ documents that laid out the strategy. And it appears that the department has now cut back a little; they're laying a little bit low on the effort. But it's a species of the government's effort to essentially deputize corporations to do their investigations for them.

**CRUDO:** I'm assuming the terrorism cases over the past decade helped the DOJ realize how effective choking off financing sources could be to get at undesirable activities or businesses that the department is targeting.

**MODERATOR: And what do you think about Assistant Attorney General Leslie Caldwell's recent remarks that all qui tam complaints will be reviewed and perhaps investigated by the criminal divisions as well as the civil divisions of U.S. Attorney's offices?**

**WALDINGER:** There has been a longstanding parallel proceedings policy in the department that this kind of information be shared between civil attorneys and criminal attorneys. AAG Caldwell is certainly focused on increasing health care fraud prosecutions and has even invited counsel for private parties to come directly to criminal AUSAs when they have relators who are going to be filing qui tam actions. Qui tams often relate to health care fraud offenses, and this area has been a DOJ priority for the last several years. I think the perception is that there clearly is a lot of fraud that needs to be dealt with in that arena.

**ILLOVSKY:** I would say that when the head of the criminal division goes out of her way to make a statement like that, it does grab the defense practitioner's attention. Her statement made it sound like every qui tam complaint will be looked at with an eye to seeing whether there is a criminal case. And those of us who have done anything in the health care fraud area know that the line between civil and criminal violations is sometimes blurry at best. So we are letting clients know that health care compliance is a top issue for DOJ and that a qui tam case can very quickly become a complicated parallel proceeding. I think the days are possibly gone where those cases could be quickly resolved with the civil division.

**LIBBY:** It's certainly a noted procedural change that got everyone's attention. But I wonder on a substantive basis whether it's really going to change the numbers of qui tam cases that end up going criminal unless the civil and criminal divisions of U.S. Attorney's offices change their prosecutorial guidelines. And I don't see that happening.

**WALDINGER:** From a line prosecutor's perspective, it's not necessarily changing standards. But this is a zero sum game: You can say we want to share these qui tam complaints with criminal prosecutors early on, but you need resources. You need the agency resources to look at the data. I've had these investigations, and they can be monstrous, especially in the arena of health care fraud. You are commonly dealing with a huge set of numbers in Excel spreadsheets. It will be interesting to see if the department is able to devote resources to this in terms of paralegals and additional AUSAs. Because many people would say that's probably where the difference is going to be made, if there is going to be a difference in actual criminal prosecutions related to those qui tam complaints.

**ILLOVSKY:** Once the criminal side gets involved, they can be a lot more persuasive in getting a company to cooperate and to reach some early resolution. And to tie it back to something we talked about earlier, if you're concerned that the use of these deferrals and nonprosecution agreements is actually encouraging the government to pursue cases that in the past would have been declined, then you may be concerned about the criminal division being involved more in the initial review, because it's going to lead to more pressure to cooperate and settle early.

**WALDINGER:** At the very least, again from a line prosecutor's perspective, perhaps having criminal AUSAs involved earlier on, even if it doesn't lead to a settlement, may lead to a change in behavior at the company with respect to health care billing practices that you want to have changed. So maybe from a regulatory perspective it's good.

**MODERATOR: Are there any other recent developments in white-collar criminal law that we should address at the end of our conversation here?**

**CRUDO:** One little tidbit came out toward the end of the year in *Whitman v. United States*, No. 14-29 (Nov. 10, 2014), an insider trading case out of New York. The Court denied certiorari in that case, but Justice Scalia wrote a few paragraphs that could give some food for thought to defense lawyers.

The point there, although the issue is broader, was an SEC regulation that says if you are in possession of inside information when you trade, there's a presumption that you traded on the basis of that information. Other circuits don't apply that presumption in criminal cases.

Justice Scalia is wary of regulations applicable in both civil and criminal cases that stretch criminal liability to reach conduct that the underlying statute doesn't clearly cover. He essentially said, "This case doesn't tee up the issue, but I'm looking for one that does." So that may be something that we'll see more of from the defense side, pushing back against certain regulations in securities and other kinds of cases.

**ILLOVSKY:** His view toward statutory interpretation and construction tends to be much more defense-lawyer-friendly and a much more preferred approach, at least from where I stand.

**CRUDO:** Not only that; philosophically he is a strong believer that the legislature, not the executive, determines what is criminal conduct. So on both counts, it may not be a surprise that he would be interested in that argument.

**WALDINGER:** Well, his statements go back to the question of whether that is an implicit invitation for Congress to step in instead of having the executive branch defining the parameters of insider trading.

**CRUDO:** Absolutely. But I could see defense lawyers seizing on Justice Scalia's language in cases in all different areas, not just securities. So we'll see. ■

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# WHITE-COLLAR CRIMINAL DEFENSE PRACTICE GROUP

Morrison & Foerster's White-Collar Criminal Defense Practice Group includes former Assistant U.S. Attorneys, former senior officials of the SEC, DOJ, CFTC, and FINRA, and an in-house Certified Fraud Examiner and former Big Four audit partner. We represent corporations and individuals in complex criminal and regulatory matters and investigations around the world. We have extensive criminal trial experience. We effectively manage internal and external investigations, as well as parallel proceedings involving multiple enforcement and regulatory authorities. We help companies navigate corporate crises.

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- Insider Trading / Market Manipulation / Securities and Accounting Fraud
- Intellectual Property Crimes
- LIBOR / Benchmark Rate Fixing
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- Political Corruption
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