



## WHITE COLLAR CRIME COMMITTEE NEWSLETTER

SUMMER/FALL 2013

ABA CRIMINAL JUSTICE SECTION WCC Committee

### MESSAGE FROM THE NEWSLETTER SUBCOMMITTEE CHAIR

**Welcome to the Summer/Fall 2013 Edition of the White Collar Crime Committee Newsletter.**

The White Collar Crime Committee Newsletter showcases content and opinion of leading experts, scholars, and practitioners through articles written by our Criminal Justice Section members.

In this edition of the Newsletter, *Thomas Gorman* writes on the New FCPA Guide from late 2012, and *Kristin Rivera and Sulaksh Shah*, discuss the role of Forensic Accountants under this Act. David *Deitch* discusses Sentencing Guidelines and the abandonment of Sentencing Guideline Loss Tables and Jason Freeman discusses their new role in white-collar crime cases. *James Glass* urges comprehensive representation for White Collar Crime defendants in the wake of the Padilla decision and Jeannette L. Chu discusses what one should know about export controls and related risks in China. We hope you enjoy this issue, and encourage you to submit an article for our next Winter/Spring edition.

If you would like to submit an article for our next edition or have ideas on a subject for a topical Newsletter, please contact the WCCC Newsletter Chair, Salma S. Safiedine at [S.Safiedine@SPartnersLaw.com](mailto:S.Safiedine@SPartnersLaw.com).

### FEATURED ARTICLES

#### **The New FCPA Guide: A Road Map to Crafting an Effective Compliance Defense**

**By Thomas O. Gorman**

The U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) published their long-awaited guidance on the Foreign Corrupt Practices Act (“FCPA” or the “Act”) in late 2012, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“Guide”). The events that led to its issuance began with DOJ and SEC enforcement officials creating what they now call the New Era of FCPA enforcement. That New Era is characterized by expansive interpretations of the Act that are a function of prosecutorial charging discretion, industry sweeps, ever increasing sums paid to settle and earn cooperation credit and demands for longer prison terms.

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_gorman.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_gorman.pdf)

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## **FCPA: The Role of Forensic Accountants**

**By Kristin Rivera and Sulaksh Shah, Director**

It's the day before a Fourth of July weekend and the General Counsel (GC) of a Securities Exchange Commission (SEC) registrant requests an urgent meeting with the Chief Compliance Officer (CCO) and the Vice President of Internal Audit (VP-IA). The GC tells the stunned executives that a whistleblower has come forward with allegations that bribes, disguised as consulting fees, are being paid by the company's South Korean subsidiary. How, the GC asks, could this have happened, when the compliance and internal audit teams performed what appeared to be a thorough anti-corruption compliance audit in Seoul just last year?

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_shah\\_rivera.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_shah_rivera.pdf)

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## **The End of the US Sentencing Guidelines Loss Tables**

**By David Deitch**

Looking back at the history of how a particular legal framework or doctrine emerged, flourished and then disappeared, one can often identify key moments that signaled the demise of that framework or doctrine. In the case of the application of the United States Sentencing Guidelines, the Supreme Court's 2005 decision in *United States v. Booker* – in which the Court ruled that the Guidelines were no longer mandatory but merely advisory – was clearly one such moment. Only time will permit the perspective necessary to tell, but U.S. District Judge Jed Rakoff's October 2012 sentencing decision in the case of *United States v. Gupta* may very well be another such moment, particularly with regard to the loss tables that drive Guideline calculations in many white collar criminal cases.

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_deitch.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_deitch.pdf)

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## **Comprehensive Representation: A Holistic Approach to White Collar Criminal Defense**

**By James J. Glass, Ph.D.**

In *Padilla v. Kentucky*, the U.S. Supreme Court found that a defense attorney failed to adequately represent his client, José Padilla, a non-citizen, but lawful permanent resident of the United States, because he did not advise Mr. Padilla that entering a guilty plea could result in deportation. The majority opinion states:

It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the 'mercies of incompetent counsel.' Richardson, 397 U.S. at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.

*Padilla* marks “the first time that the Court has applied the 1984 Strickland standard to a lawyer’s failure to advise a client about a consequence of conviction that is not part of the sentence imposed by the court.”

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_glass.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_glass.pdf)

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**Diversion Ahead:  
Doing Business With China? What You Should Know About Export Controls  
and Related Risks**

**By Jeannette L. Chu**

*Exporters should seek to understand the wide range of risks related to US export control regulations and how these intersect with their customers and suppliers in China.*

Much like driving a car, navigating today’s global 24/7 business environment demands the ability to anticipate threats, as well as the dexterity to respond swiftly and appropriately when they materialize. The ability to ‘see beyond the bend in the road’ can be crucial to understanding and managing export compliance risks. These risks can come at nearly any point in the lifecycle of a product or transaction.

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_chu.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_chu.pdf)

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**What Role Should the Guidelines Play in Sentencing White-Collar Offenders?**

**By Jason B. Freeman**

In a post-*Booker* world, the Guidelines serve a limited function in the sentencing calculus: They are, in the words of the Supreme Court, nothing more than a “*rough approximation* of sentences that *might* achieve § 3553(a)’s objectives.” Section 3553, not the Guidelines, is the ultimate touchstone; and it provides the following overarching rule: Sentences must be “sufficient, but not greater than necessary,” to fulfill the purposes of sentencing laid out at 18 U.S.C. §3553(a)(2). Accordingly, the Guidelines do not, in theory, even enjoy a presumption of correctness during sentencing.

**READ MORE at**

[http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc\\_freeman.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_freeman.pdf)

**CJS UPCOMING EVENTS**

**Foreign Corrupt Practices Act:** Sept. 18-20, Washington, DC



**2nd Annual International White Collar Crime Conference:** Oct. 7-8, London, UK

**Securities Fraud Institute:** October 24 - 25, New Orleans, LA

**CJS Fall Meeting:** Oct. 31- Nov. 3, Washington, DC

**Criminal Tax Fraud and Tax Controversy 2013:** Dec. 11-13, Las Vegas, NV

Visit The Criminal Justice Section's Complete Calendar at  
[http://www.americanbar.org/groups/criminal\\_justice/events\\_cle.htm](http://www.americanbar.org/groups/criminal_justice/events_cle.htm)

## RECENT PUBLICATIONS

### **The State of Criminal Justice 2013**

Examines and reports on the major issues, trends and significant changes in the criminal justice system.

### **The Rights of the Accused Under the Sixth Amendment**

This essential resource takes a close look at The Sixth Amendment to the U.S. Constitution and those key provisions which impact mightily on defendants in criminal prosecutions.

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#### **White Collar Crime Committee Newsletter**

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*The opinions expressed are those of the authors and shall not be construed to represent the policies or positions of the ABA or the ABA Criminal Justice Section.*

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