

SEC Enforcement: Key Developments in 2011

December 14, 2011

Agenda

- Introduction
- Presentation
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
 - www.securitiesdocket.com
- Wrap-up

Webcast Series

- Approximately every other week
- January 10, 2012: **“Investigating Accounting Misconduct”**

Panel



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SEC Enforcement Key Developments from FY 2011

December 14, 2011

FTI or WilmerHale represented a client in some of the cases to be discussed. The statements made during this webcast do not necessarily reflect the views of any client or other personnel of FTI or WilmerHale



New Developments in 2011

- Record Enforcement Results in 2011
- Focus on Insider Trading and Financial Crisis Cases
- New Methods of Enforcement
- Regulation Fair Disclosure Resurfaces
- Auditor Regulation Issues
- Aggressive FCPA Enforcement
- Impact of Supreme Court Decisions
- Cases the SEC Lost
- Cooperation and Settlement Developments
- Implementation of Dodd Frank

SEC Enforcement Activity, 2007 - 2011

Enforcement Actions by FY	2007	2008	2009	2010	2011
Broker Dealer	89	67	109	70	112
Delinquent Filings	52	113	92	106	121
Financial Fraud/ Issuer Disclosure/ FCPA	219	154	143	126	109
Insider Trading	47	61	37	53	57
Investment Advisor, Investment Company	79	87	76	112	146
Market Manipulation	36	53	39	34	35
Securities Offering	68	115	141	144	124
Other	65	21	27	32	31
Total Enforcement Actions	655	671	664	677	735

Increasing Levels of Enforcement Activity: Broker Dealer, Delinquent Filings, Invest. Advisor

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Decreasing Levels of Enforcement Activity: Overall Financial Fraud/ Issuer Disclosure/ FCPA Totals

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Certain Matters = Multiple Cases Filed

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Example: 11 of the 126 FY 2010 items relate to Bally Total Fitness matter, including cases against the Company, officers, audit firm, and various auditor individuals

Insider Trading Cases

- **Galleon Management and related parties**
 - Proceedings by SEC and DOJ
 - Hedge fund manager Rajaratnam
 - Convicted on several counts of insider trading
 - Sentenced to 11 years
 - SEC record \$92.8 million civil penalty
 - SEC obtained judgments in 18 actions arising out of its investigation of the hedge fund
 - SEC charged former Goldman Sachs and Procter & Gamble director with illegally tipping

Insider Trading Cases

- **Front Point**

- Fund manager used insider tip to avoid fund losses
- Fund majority stakeholder, Morgan Stanley, paid \$33 million fund settlement with the SEC; no investor money used
- Fund manager pleaded guilty and sentenced to 5 years in prison
- Dr. Benhamou—tipper—pleaded guilty to insider trading and obstruction of justice

- **International Cooperation: Obstruction and Insider Trading**

Financial Crisis/CDO Cases

•Cases:

- Citigroup
 - SDNY rejection of settlement
- J.P. Morgan Securities
- Stifel, Nicolaus and RBC Capital Markets
- Wachovia Capital Markets

•SEC Staff:

- Enforcement of negligence-based charges

Outside Director Liability

- ***SEC v. Krantz***
 - 3 outside directors charged with securities fraud because they ignored red flags indicating accounting fraud, reporting violations, and misappropriation of company assets by executives
 - Settlement: \$100,000 civil penalty each; permanent officer and director bars; and disgorgement amounts of \$100,000, \$375,000, and \$820,000, respectively

Regulation Fair Disclosure

Fifth Third Bancorp Settlement

- SEC charged Fifth Third Bancorp with selectively disclosing its redemption of trust preferred securities in violation of Reg FD
- SEC cease and desist order against Fifth Third Bancorp
- No civil penalties because Fifth Third Bancorp cooperated with the SEC's investigation
- Remedial acts considered by the SEC: compensation of harmed investors and the implementation of policies and procedures

Executive Compensation Clawback

- **Sarbanes-Oxley § 304**
 - Limited to CEO and CFO
 - 1 year look back period
- **Beazer Homes and CSK Auto clawbacks**
 - Company executives settled with SEC and agreed to Section 304 clawback despite lack of personal misconduct
- **Dodd-Frank § 954 (final rule not implemented)**
 - All executive officers
 - 3 year look back period

Auditor Regulation Issues

•Cases

- Deloitte subpoena enforcement case
- First stop orders for post-effective amendments to registration statements because of:
 - Withdraw of support for audits by independent auditors
 - Resignation of independent auditors
 - Incomplete public filings
- SEC Order against PW India for audit failures
- Joint Inspections of global audits

PCAOB Initiatives

- Auditor Reporting Model

- Objective is to enhance the relevance of auditor communications to investors
- Nature of audit report, possibility of “auditor discussion and analysis”

- Auditor Independence

- Discussions regarding term limits
- November 30, 2011 European Commission proposals

- Audit Transparency

- Potential disclosures regarding audit participants
- Disclosure of other accounting firms participating in the audit

Foreign Corrupt Practices Act

Cases:

- *Johnson & Johnson*
- *Maxwell Technologies, Inc.*
- *Watts Water Technologies, Inc.*
- **Focus on sovereign wealth funds**
- **Small number of FCPA whistleblower tips**

Supreme Court Cases

- ***Matrixx Initiatives, Inc. v. Siracusano***
 - Materiality
- ***Janus Capital Group, Inc. v. First Derivative Traders***
 - “Maker” Liability

Supreme Court Cases

Impact of *Janus* on SEC cases

- Generally held to preclude Rule 10b-5 claims against non-“makers” of misstatements
 - Departure from *Janus*: *SEC v. Landberg*
- Courts have split on whether *Janus* should apply to SEC claims under Section 17(a)
 - *SEC v. Daifotis*
 - *SEC v. Kelly*
 - *In the Matter of John P. Flannery*

Cases the SEC Lost

- ***SEC v. Morgan Keegan and Co.***

- Firm charged with hiding risks of auction-rate debt from customers
- Court held disclosures were adequate and firm's "[f]ailure to predict the market [did] not constitute securities fraud"

- ***SEC v. Nacchio***

- Employees charged with inflating revenues
- No substantial assistance or signature; only "ministerial" role in drafting

SEC Criticism of Defense Counsel Bar

- Khuzami criticisms involving the defense bar:
 - Multiple representations
 - “Suspiciously harmonious” witness testimony
 - Lack of recollection
 - Counsel signaling to clients during testimony
 - Document product issues
 - Perceived non-independence of internal investigations

SEC Cooperation Initiative in Practice

- 1st Non-Prosecution Agreement
- 1st Deferred Prosecution Agreement
- Whistleblower Program

SEC Rulemaking

- Whistleblower rules finalized in August 2011
- SEC received 334 tips from August to September
- The most common complaint categories:
 - market manipulation (16.2%)
 - corporate disclosures and financial statements (15.3%)
 - offering fraud (15.6%)
- No whistleblower awards paid in 2011

Questions?

Thank You
For Attending This Webcast