

SEC ENFORCEMENT UPDATE: A WOUNDED ANIMAL IS A DANGEROUS ANIMAL

April 21, 2009

Agenda

- Introduction
- Presentation
 - Michael MacPhail, Holland & Hart LLP
 - Patrick Hunnius, White & Case LLP
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
 - > www.securitiesdocket.com
- Wrap-up

Webcast Series

- Series of webcasts — every other week
- www.securitiesdocket.com/webcasts
- **April 28:** “Inside the SEC Enforcement Division: Current and Former SEC and DOJ Prosecutors Discuss Important Changes Ahead”
 - George Curtis, Pamela Parizek, David Seide
- **May 8:** “Hedge Funds: A Brave New World of Regulation and Enforcement”
 - Philip Khinda, Susan Markel, Ellen Zimiles

Panel



Michael MacPhail



Bruce Carton



Patrick Hunnius

SEC Enforcement Update: a Wounded Animal is a Dangerous Animal

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April 21, 2009

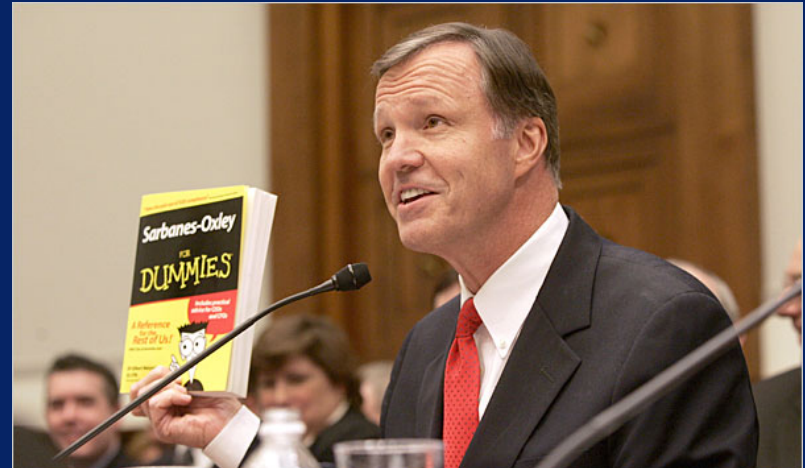
Overview

- Decline during the Cox era and disastrous 2008
- Personnel changes
- New Aggressive approach
- TROs: Statistics and Fairness Concerns
- Wells process and access grants: further fairness concerns



Decline Under Chairman Cox

- 2005-07 Statistics
- 2008: Disaster Strikes
 - Legislative Reform
 - Madoff and Markopolos
 - Cox as Campaign Issue



New Cops on the Beat

- Procedural Enhancements
- Budget Increase
- Better PR
- Get Tough Approach



All TROs, All the Time?

- 2009 versus 2008 -
Statistics
- Characteristics – Asset
Freezes
- Legal Standards



Asset Freezes (cont.)

- Attorney's Fees and Living Expenses
- SEC's Uncompromising Position
 - “Bank robber” analogy
- Courts as Enablers



Asset Freezes (cont.)

- A Matter of Trust and Discretion
- Ulterior Motives
 - Favorable Publicity
 - Conserve Litigation Resources
 - Forced Settlements and Defaults
- Evidence of Abuses



How to Recognize When a TRO is Coming

- Type of Case
- Ongoing Conduct
- Fund Transfers
- Staff Behavior



How to Avoid a TRO

- Dialogue with the Staff
- Cease Ongoing Conduct
- Cease Transfer of Funds
 - Voluntary Undertakings
 - Escrow Accounts
- Proof and Communication

Access to Investigative File – Another Fairness Issue

- Wells Process -Background
- Learning About Proposed Case
- Publication of Enforcement Manual
- Arbitrary and Capricious Standards
- Uneven Application

CONTACT INFORMATION

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SEC Enforcement Update – Part 2

2 Current Enforcement Priorities That Are Likely Here to Stay

- Vigorous FCPA enforcement
- Attorneys and other professionals as “gatekeepers”

FCPA Enforcement in the Era of SWFs and “Bailouts”

- Act’s definition of “foreign official” includes “any officer or employee of [any] instrumentality” of a foreign government OR “any person acting in an official capacity for or on behalf of any such ... instrumentality”
- Act does not provide guidance regarding what qualifies as an “instrumentality.”
- Need not “know” that recipient of payment is a “foreign official” to be liable

SEC and DOJ Interpret “Instrumentality” to Include State-owned Enterprises

- **Con-way, Inc. [2008]**
 - Allegedly improper payments to state-owned airlines
- **Baker-Hughes [2007]**
 - Allegedly improper payments to entity “controlled by officials of the Government of Kazakhstan”
- **Alcatel [2007]**
 - Allegedly corrupt payments made to officials of Costa Rica’s state-owned telecommunications authority
- **Confirmed by several opinion releases**

SEC and DOJ Interpret “Instrumentality” to Include State-owned Enterprises

- In public commentary, Mark Mendelsohn, Deputy Chief of DOJ’s Fraud Section and the functioning head of its FCPA enforcement program has signaled:
 - That foreign government majority ownership is likely sufficient to qualify the enterprise as an instrumentality; AND
 - That in certain cases, minority ownership may well qualify.

Increase SWF Investment Activity *Could* Transmute Ordinary Business Partners Into Foreign Government “Instrumentalities”

- **Daimler**
 - March 23, 2009: Abu Dhabi’s Aabar Investments purchases 9.1 per cent of Daimler
 - 2d largest shareholder: Kuwait
- **Financial Institutions**
 - Blackstone
 - Morgan Stanley
 - Citigroup
 - UBS
- **Real Estate**
 - City Center – Las Vegas (joint venture b/w MGM Grand and Dubai World, which also owns a significant percentage of MGM Grand shares)

Current European Government “Bailout” Activity is Having an Even More Pronounced Effect

- On March 9, 2009, Iceland nationalized the Straumur-Burdaras Investment Bank, seizing 100% control of the last remaining independent investment bank in the country. The Icelandic government had previously nationalized Iceland's other three major investment banks as a result of the global credit crisis.
- Germany provided €87 billion in loan guarantees to Hypo Real Estate Holding AG, a real estate financing bank, and is preparing the legal framework to nationalize the financial services corporation.
- British government pledged to insure up to £250 billion in assets held by the Lloyds Banking Group (formed from the merger of Lloyds TSB Group PLC and HBOS PLC) in exchange for a 65-77% ownership stake in the bank; also holds approximately 70% of Royal Bank of Scotland.

A New Need to “Know Your Customer”

- Reassess the company's level of exposure and risk, especially with respect to doing business with any overseas entity that has received government funds;
- Reexamine company policies to make sure they adequately protect the company in this new public sector environment; and
- Redouble efforts to provide compliance communications and training to employees and agents.

Lawyers as Gatekeepers

- For years, SEC and DOJ has asked, post-scandal *du jour* "Where were the professionals?" (Larry Thompson, Deputy Attorney General, October 28, 2002)

April 2009: SEC v. Copeland

- "Copeland used his status as a legal professional and authority on estate planning to lure investors into a false sense of security," said Katherine Addleman, Director of the SEC's Atlanta Regional Office. "The SEC will continue to take swift action against attorneys and other individuals who abuse their position and status to defraud investors."
- February 2008: SEC v. Christison
 - "Today's action demonstrates that even after we stop those who profit from fraudulent schemes, we continue to pursue other individuals, especially attorneys and other gatekeepers who are enablers behind the scenes," said Linda Chatman Thomsen, Director of the SEC's Division of Enforcement.

Lawyers as Gatekeepers

- Focus on lawyers confirmed in backdating prosecutions
 - 8 general counsels charged by SEC or DOJ
 - 1 acquitted (and SEC dropped charges)
 - 3 settled/plead guilty
 - 4 still face charges by the SEC

Lawyers as Gatekeepers

- 2 current extraordinary cases
 - US v. Collins
 - US v. Offill

Thanks for listening

Questions?

Thank You

Thank you for attending this webcast.

