



You may hear from the SEC: the global reach of securities enforcement

Jun 04 2009 Eugene Goldman

Investor schemes and market abuses often do not stop at a country's border. With modern technology, such conduct is often carried out far from the perpetrator's location. In response, the Securities and Exchange Commission has developed a sophisticated cooperative mechanism via bilateral and multilateral agreements with regulators around the world. This mechanism includes the gathering of information from third parties such as banks, brokerage firms and custodians, disclosing the identity and trading activity of those with accounts abroad and the foreign regulator taking formal action at the request of the SEC to take witness statements under oath and compel the production of documents. From accounting matters to suspected corrupt payments, it is fair to conclude that the SEC has been able to duplicate outside the United States many of the investigative requirements imposed on those in the US.

The expanding global reach of the SEC can impact compliance personnel. First, in-house detection of suspected overseas activity can prompt compliance to bring it to the attention of its home regulator. Cooperation between the home regulator and the regulator where the suspect activity is taking place helps to combat the scheme and may generate information that permits the taking of appropriate personnel action and systems reviews. Second, fraudulent schemes that impact the US market can result in the SEC seeking information via your home country securities regulator. There is a good chance, therefore, that a foreign firm whose customers or personnel are conducting questionable activities overseas will hear from the SEC via its foreign counterpart or as a result of the SEC contacting the firm's US affiliate.

President Obama's budget message to Congress, boosting for the first time an SEC budget request in excess of \$1bn for FY2010, notes the importance of funding the SEC's international activities. It cites a major international regulatory policy initiative to strengthen investor protection "as well as work with the Division of Enforcement on numerous cases with significant international components". In his last speech on this topic before leaving the SEC, chairman Christopher Cox noted that the "scale of our international enforcement cooperation has been massive ... [and] over the last year, the SEC made 556 requests of foreign regulators for assistance ... [and] received 454 requests from foreign regulators for this kind of enforcement help".

Representative cases

The breadth of SEC international enforcement is illustrated by the following cases:

SEC v Halliburton and KBR, Inc. (S.D. Tex. 2009). Alleged bribery of Nigerian officials through sham contracts with agents in the United Kingdom and Japan using bank accounts in Switzerland and Monaco. Halliburton and KBR agreed to pay \$579m to settle the SEC's Foreign Corrupt Practices Act charges and parallel Department of Justice criminal charges. Foreign authorities in Europe, Asia, Africa and the Americas assisted the SEC.

SEC v Suterwalla, No. 06-CV-1446 (S.D. Cal. 2008). The SEC regularly brings insider trading cases that involve the purchase of out-of-the-money call options and other securities by unknown persons. These actions often succeed in securing court orders that freeze the proceeds of such trading before they are wired abroad. For example, in the Suterwalla action, the SEC brought action against an "unknown purchaser" of call options and derivative securities in Petco Animal Supplies Inc. who purchased in advance of the public announcement of Petco's sale to two private equity firms. At the time of the filing, the SEC obtained a freeze order over the proceeds of the sales following the announced purchase of Petco, but the identity of the purchaser was unknown to the SEC. Subsequently, the SEC, with the assistance of the UK's Financial Services Authority and the Swiss Federal Banking Commission, identified the purchaser as a London resident and sued him for purchasing call options through a Swiss institution and derivative "spread bets" from UK institutions. Suterwalla settled the case by paying almost \$3.9m.

SEC v Watson, et al., (S.D. Texas, May 21, 2009) (asset freeze and restraining order based on alleged phony bank statements from a Swiss bank and false claims of \$70m on deposit there). The Panama National Securities Commission, the Swiss Financial Market Supervisory Authority and the FSA assisted the SEC.

SEC v Hu, Asenqua, Inc., et al., (N.D. Cal., March 18, 2009) (alleged defrauding of hedge fund customers and misappropriation of investor funds to accounts overseas). The Monetary Authority of Singapore and the Hong Kong Securities and Futures Commission assisted the SEC. Hu was arrested in Hong Kong.

SEC v Stefan Berger, et al., (N.D. Ill., February 3, 2009) (emergency action to stop sales agents based in Europe who made alleged fraudulent stock sale calls to residents of the UK, Germany and other European countries). The FSA and the London Police's Financial Intelligence Development Team assisted the SEC.

SEC v Escala Group, et al., (S.D.N.Y., March 23, 2009) (alleged fraudulent related party transactions between a Nasdaq company and its privately-held Spanish parent company). Spanish authorities assisted the SEC and raided the parent company's offices to halt an alleged massive pyramid scheme.

SEC v Abellan, et al., (W.D. Wash., August 14, 2008) (transatlantic "pump and dump" scheme that involved a Spanish national living in Barcelona, who operated in Belize and other locations). The SEC alleged Abellan sent into the US promotional mailers to more than two million recipients. Once the SEC determined that money from the alleged fraud had been wired to Andorra, the SEC was able to obtain an asset freeze with the help of Andorran authorities.

SEC v Sonja Anticevic, et al., (S.D.N.Y. 2006) (international insider trading ring). The Financial Supervisory Authority in Denmark, the Financial Market Authority in Austria, the Croatian Security Commission and the FSA assisted the SEC.

Seeking foreign court action

The SEC not only has secured the cooperation of foreign regulators — it seeks action by foreign courts as well. In *SEC v Manterfield*, (High Court of Justice, February 28, 2009) the highest court in the UK dismissed an appeal of an order of a lower court freezing approximately \$1m in assets of a defendant in a pending SEC enforcement action. The SEC alleged that Manterfield misappropriated millions of dollars from hedge fund investors. The SEC retained a solicitor and a barrister to represent it in the English court system, and filed an application for a freeze order in its own name. The Court of Appeal dismissed the appeal of the lower court order that the SEC, if successful in obtaining a judgment against Manterfield in the US, could enforce the disgorgement element against the UK assets, but could not use the assets to secure enforcement of a penalty.

Need for preparation and experienced counsel

As indicated above, for foreign financial services firms and individuals operating outside the US, being far from the US geographically should provide little or no comfort that questionable activities directed at US investors are safe from SEC scrutiny. Those abroad work in the context of foreign law and are not used to the tenacity and level of scrutiny of an SEC investigation, with interrogations that can last one or more days and detailed yet broad document demands, including demands for e-mails and other electronic documents. Interrogations are under the auspices of the foreign regulator, although SEC attorneys are present and have been known to ask all the questions. In addition, the SEC recently has been reaching "enhanced" cooperative agreements that expand the scope of information requested to include audit work papers, telephone and mobile phone records, credit card records, travel records, employment information and e-mail.

It is, therefore, critical for subjects of SEC requests for information to take instruction from experienced counsel who understand (1) the SEC's powers, jurisdiction and rules of practice; (2) the rights of those from whom the SEC is seeking information; (3) how to narrow the scope and/or challenge the foreign regulator's adherence to the SEC's requests; and (4) the necessity of thorough preparation and types of review needed.

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