

BUSINESS LITIGATION UPDATE**Increased SEC Enforcement – Are You Prepared?****COMMISSIONERS PROMISE RENEWED EMPHASIS ON ENFORCEMENT, WARN OFFICERS AND DIRECTORS TO INCREASE ACCOUNTABILITY**

In response to recent publicity involving the SEC, the Obama administration has appointed a new chair of the agency, who in turn has rapidly made important personnel changes, taken steps to free up the Division of Enforcement staff and mounted a campaign aimed at restoring the confidence of Congress, the markets and individual investors. While enforcement activity is expected to increase at the same time companies are looking to cut costs, there are steps that public companies and their officers and directors can take to position themselves in the event they receive an inquiry from the SEC Enforcement staff.

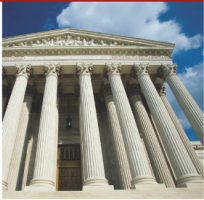
Empowering Enforcement

Early indications are that the SEC commissioners are making changes to provide greater power and flexibility to the Enforcement staff. Some of the important changes made by new SEC Chair Mary Schapiro in the first few months of her tenure include:

- Hiring longtime federal prosecutor Robert Khuzami as director of the Division of Enforcement. Khuzami is the former chief of the Securities and Commodities Task Force in the U.S. Attorney's office for the Southern District of New York.
- Ending the SEC's two-year "penalty pilot" experiment, which had required the Enforcement staff to obtain a special set of approvals from the Commission in cases involving civil monetary penalties for public companies as punishment for securities fraud. Enforcement staff had found this program ineffective, believing that it delayed corporate penalties and discouraged them from arguing for penalties.
- Arranging for more rapid approval of formal orders of investigation, which enable the Enforcement staff to subpoena documents and testimony.
- Prevailing upon the Obama administration to propose increases in the agency's budget to enable it to reverse the trend of declining SEC staff.

What might this trend mean for corporate America?

- Greater responsiveness by the SEC staff to whistleblowers and tips, to counteract criticism that the agency failed to heed warnings about the Madoff and Stanford Ponzi schemes, among other frauds.



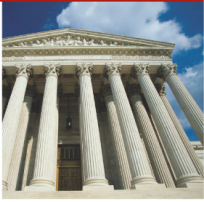
- A larger number of enforcement investigations.
- Investigations that will last longer and be more detailed as a result of the staff's fear that they will miss something, as they did in the Madoff inspections.
- More and larger penalties assessed against companies.

Protective Actions

How can you reduce the likelihood of the SEC Enforcement staff calling on you and, if they do, enhance your chances of coming through an inquiry or investigation largely intact? Some suggestions:

- Set a tone at the top that there will be zero tolerance for misconduct.
- Immediately investigate reports, allegations or suspicions of misconduct.
- Where misconduct has occurred, take swift disciplinary action and evaluate whether additional controls are necessary to avoid similar misconduct in the future.
- Toward the end of each quarter, be on the lookout for unusual transactions that may be undertaken to meet targets, or any other places where employees might be tempted to cut corners. Studies show that in a deteriorating economy, instances of round-trip transactions, bogus invoices, shipments to warehouses and other means of booking fictitious revenues tend to go up.
- Do not short-change your compliance and internal audit functions. Avoid the temptation to include these areas in budget and personnel cutbacks.
- As a part of your compliance program, make sure you have undertaken a risk assessment to evaluate where the business might be in conflict with legal requirements or financial standards.
- Boards should devote a portion of each meeting to spending time with the internal audit staff, the chief compliance officer, the general counsel and the controller to understand what issues are causing them concern.

For additional information on how to handle an informal inquiry or subpoena from the SEC, go to www.ThompsonHine.com/publications/pdf/2008/12/top10things1655.pdf.



FOR MORE INFORMATION

For more information on this topic, please contact:

David A. Wilson	202.263.4161	David.Wilson@ThompsonHine.com
Thomas Aldrich	216.566.5749	Tom.Aldrich@ThompsonHine.com
Norman A. Bloch	212.908.3942	Norman.Bloch@ThompsonHine.com
Douglas E. Grover	212.908.3920	Douglas.Grover@ThompsonHine.com
Leslie W. Jacobs	216.566.5675	Les.Jacobs@ThompsonHine.com

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