

FOLEY EXECUTIVE BRIEFING SERIES



Enforcement Priorities in the Wake of the Financial Crisis

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NATIONAL ENFORCEMENT PRIORITIES

- The ongoing financial crisis has led to a number of expansive and high profile federal and state enforcement actions.
- Over 24 investigations have been initiated in response to the home loan and financial crisis.



RECENT INVESTIGATION EXAMPLES

- **IndyMac:** July FBI investigation
 - Quality of investments
 - Information that should have been disclosed

- **Washington Mutual:** October FBI investigation
 - False information
 - Ineligible clients
 - Bad appraisals
 - Bad underwriting
 - False statements to investment community



RECENT INVESTIGATION EXAMPLES

■ Fannie Mae and Freddie Mac

- New York Attorney General
 - Investigating accounting, disclosure, corporate governance and conflicts of interest
- SEC
 - September filing

■ AIG

- New York Attorney General investigation
 - Payments to departing CEO and other senior executive
 - Travel expenses and “perks”

■ New York law

- Prohibits insiders from enriching themselves and endangering creditors when the firm is in danger of insolvency.



RECENT INVESTIGATION EXAMPLES

■ Countrywide Financial

- FBI investigation into largest US mortgage lender
- Alleged misrepresentation regarding financial state and security filings

■ Lehman Brothers

- October New Jersey Attorney General announcement
 - Lehman may have lost state \$180 million dollars in investments due to false information

■ Wall Street

- New York Attorney General investigating the spread of false information about **Lehman Brothers, AIG, Goldman Sachs and Morgan Stanley**



NATIONAL ENFORCEMENT PRIORITIES

- **Broad spectrum of possible allegations:**
 - Insider trading
 - Accounting fraud
 - Securities fraud (misrepresentations or failure to disclose) mortgage fraud
 - Fraudulent conveyance
 - Corporate governance issues (conflicts of interest, executive comp)
- **Investigations may be initiated by:**
 - Individual state
 - Attorney General
 - FBI
 - SEC
 - Agency IGs
 - USAOs



WHAT DOES THIS MEAN FOR ME?

- **Sets the Tone for Local Enforcement Priorities**
 - National enforcement priorities influence the enforcement priorities of the state and local agencies.
- **Self-Assessment**
 - Critical that companies do a self-assessment to determine their potential civil or criminal liability *before* any investigation or litigation is initiated.
 - If you wait until you receive a subpoena, you are behind the 8 ball.
 - Short time frames to respond to the subpoena; might not be adequate time to evaluate the facts and prepare defenses



CONDUCTING THE SELF-ASSESSMENT

- **Do your own internal investigation to learn the key facts**

- **You may decide to retain outside counsel:**
 - To maintain attorney-client privilege
 - To maintain confidentiality
 - To get an independent, experienced investigator



CONDUCTING THE SELF-ASSESSMENT

- **Review and assess quality of current written policies and procedures**
 - Determine whether these policies are followed
- **Interview employees with knowledge of your company's:**
 - Accounting practices
 - Financial systems and controls
 - Compliance with securities laws
- **Collect documents**
 - (including electronic files and e-mail) and have counsel review



CONDUCTING THE SELF-ASSESSMENT

■ Counsel will:

- Review policies, procedures and other relevant documents
- Interview employees
- Inform employee that counsel represents the company and not the employee as an individual
- Explain privilege and let the employee know the conversation is confidential
- Consider whether the Company should provide independent counsel for employees being interviewed



CONDUCTING THE SELF-ASSESSMENT

- Prepare a final report (oral or written)
- Provide report to senior management and/or the Board
- Develop a *specific* plan for corrective action that may include discipline of individuals, new policies and procedures, and new internal controls



CONDUCTING THE SELF-ASSESSMENT

■ Determine whether to make a voluntary disclosure

- Voluntary disclosure of wrongdoing is the strongest indication of corporate integrity
- It often results in leniency from the government with respect to criminal proceedings as well as suspension and debarment
- (voluntary disclosure demonstrates present responsibility)
- Cooperation is the number one factor prosecutors consider when deciding whether or not to charge a company

■ Risk:

- No free pass for voluntary disclosure (likely hefty fines, possible prosecution, may lead to action by states)



Foley's Financial Crisis Response Team

■ FCRT

- In September, Foley established its Financial Crisis Response Team
- Created to monitor the continuing developments of this historic financial crisis and provide clients with proactive legal and business counsel
- This will help clients adapt to and navigate the changing financial landscape

■ The multi-disciplinary team includes:

- Senior attorneys
- Public affairs professionals with significant experience across a broad range of practices including securities and commodities, corporate, public policy, tax, financial, real estate, trusts, securities litigation and bankruptcy