

How To Set The Stage For A Global Deal

By **Shannon Henson**

Law360, New York (October 25, 2010) -- Negotiating a global settlement when the U.S. Department of Justice, the Securities and Exchange Commission and other authorities want a piece of your client can be a herculean struggle given the conflicting priorities, goals and personalities of the wolves at the door.

Achieving the ideal — resolving a matter with every interested party at the same time — has become increasingly difficult, lawyers said. State attorneys general now wade into headline-grabbing inquiries; Congress is quick to call a high-profile hearing; and federal judges such as Judge Jed S. Rakoff, who famously held up Bank of America Corp.'s settlement with the SEC, stand ready to challenge the deals you reach.

"It's difficult because everyone is looking over their shoulders thinking, 'Gee, is someone going to challenge this thing?'" Barry Mandel, chair of the securities enforcement and litigation practice at Foley & Lardner LLP, said of reaching a global settlement.

Despite the headaches, lawyers said achieving an all-encompassing deal remains key when a client is facing fights on multiple fronts. So what steps should attorneys take to resolve a matter once and for all?

1. Establish the Players

Michael Campion Miller, partner in the litigation and white collar criminal defense groups with Steptoe & Johnson LLP, said identifying who is going after your client — criminal prosecutors, regulators or others — is the first step in resolving a matter. A lawyer next needs to learn how, if at all, those players are working together.

"Understand the dynamic between them," Miller said. "Is it collaborative or competitive, or are they ignoring each other? A global settlement may be impossible to achieve while everyone is operating on their own."

The players likely have conflicting priorities: Regulators may go after a company with the hope of winning a change in company policy or personnel, while prosecutors may be trying to put a corporation's executives behind bars. And then there are the state attorneys general, who may be trying to win a headline to help them in a re-election bid.

Despite the differing goals, however, a leader of a probe typically emerges, according to Miller and Fredric "Rick" Firestone, a partner with McDermott Will & Emery LLP. Often that party ends up conducting more of the investigation than the others.

"The others are perhaps behind or are being more reactive to what the leader is doing," Firestone said.

Once the players are established, a lawyer should try to get some of the parties to back off. It may be possible to tell state authorities, for example, that the DOJ and the SEC should handle the matter, Firestone said.

“At a certain point, it's incumbent for defense counsel to try and see if they can talk to regulators and say, 'Look, this is overkill and unnecessary,' and see if they would be willing to let others handle it,” Firestone said. “It's absolutely appropriate for defense counsel to raise this with them. Why does everyone have to be at the table?”

2. Take a Coordinated Approach

It's easier to reach a global settlement if lawyers proactively show they will handle a matter with a coordinated approach from the outset.

For example, counsel could try to produce the same documents to everyone simultaneously, Mandel said. If the SEC, the U.S. attorney's office and a state attorney general are all asking for different documents, just hand over the documentation that covers each of their requests to all the parties.

“If you do that, it establishes the concept of a single response to multiple regulators,” Mandel said.

Similarly, a lawyer can ask the parties to coordinate witness depositions, though getting the investigators to show up together is a tricky proposition, Mandel said, because some investigators take certain tactics in depositions and don't want others to step on their toes.

“[But] it's worth a shot, and it sets the stage for bringing everybody together,” he said.

3. Throw Out a Number

Carlos Ortiz, a shareholder with LeClairRyan, said a lawyer could aid the global settlement process by expressing a willingness to reach a deal and floating a total figure to the authorities involved.

“Say, 'This is the most we can do in total,’” Ortiz said. “Say, 'We have no interest in how you divide it up, but it's all we can do. Come back to us with how you want to resolve this.’”

It is important not to lose sight of the complete picture when negotiating various parts of the settlement puzzle, added Firestone.

“You have to keep in mind what the global package is going to look like,” he said.

And if all else fails ... prioritize.

It's not always possible to reach a global settlement. In those cases, lawyers said resolving criminal charges should almost always take priority, whether the client is an individual or a corporation.

“Criminal charges have the potential to undermine [a company's] ability to work in a particular forum or environment,” Miller said. “Some people may choose to not do business with a client because of the cloud” of a criminal investigation.

Mandel said it's “much more important” for an individual to make sure he resolves the criminal case first.

“If the regulators have to wait, they have to wait,” he said. “No one is putting a corporation in jail, but they do put people in jail.”