INSIDE THE MINDS™

COMMON ISSUES IN SECURITIES LAW

LEADING LAWYERS ON MANAGING CLIENT EXPECTATIONS, EVALUATING SECURITIES INVESTIGATIONS, AND IDENTIFYING KEY ISSUES IN U.S. SECURITIES LAW

ASPATORE

K.B. Battaglini, Greenberg Traurig LLP
Ernest E. Badway, Fox Rothchild LLP
Seth T. Taube, Baker Botts LLP
Ross A. Albert & Heath D. Linsky, Morris, Manning & Martin LLP
Otto Sorensen, The Law Office of Otto E. Sorensen APC
Robin M. Bergen, Cleary Gottlieb Steen & Hamilton LLP

Advising Corporate Clients in Securities Enforcement Investigations

Robin M. Bergen
Partner
Cleary Gottlieb Steen & Hamilton LLP

ASPATORE

As a securities lawyer, the main thrust of my work is in the area of securities enforcement, with a focus on three types of matters. First, I represent corporate clients in a variety of industries who are the subject of government investigations; my primary focus is on investigations by the Securities and Exchange Commission (SEC), although very often when the SEC is conducting an investigation the Department of Justice (DOJ) or state attorneys general are investigating that company as well. I also represent individual directors and officers when both a company and key individuals at that company are being investigated.

My third area of focus in securities enforcement involves representing boards of directors or audit committees that are conducting their own internal investigations in instances where (1) there is no government investigation at the present time, but the board or committee anticipates that there will be one in the future; or (2) a government investigation has already recently begun.

In addition to my focus on securities enforcement, I also represent investment banks, asset managers or other market participants in structured finance transactions. In these transactions, I provide advice on structuring and regulatory issues, as well as negotiate and draft deal documentation and disclosure. I believe that my experience in both of these areas—transactions and enforcement—allows me to offer unique value to my clients, in that I am able to bring my expertise from my transactional work to bear on my enforcement work. My experience in structuring complex financial instruments has been of particular value to my recent work on matters stemming from the difficulties in the credit markets. I am well versed in accounting concepts, as well as financial statement and disclosure issues, and spending time on transactions gives me a good window on a client's overall objectives. I am able to develop a good rapport with the business people I work with because I understand their business; I am up to speed on a variety of business and financial concepts, regardless of the client's industry; and I am able to bring that perspective to bear on the securities enforcement investigations that I handle.

Trends in the Securities Area

Perhaps the biggest trend in the securities area at this time is the crisis in the credit markets; it is not often the case that an economic trend dovetails with political and regulatory activism to the extent that these events have. The change in the markets, and the effect of the losses that the major investment banks and other participants across the spectrum of the subprime industry have suffered, have made many regulators take notice, and we are seeing the repercussions of this event ripple throughout the economy. Government regulators are very active and interested in this area—launching investigations to determine whether this crisis was caused by possible fraud or merely unanticipated losses. In addition, they want to be seen as taking an active interest in this issue. Shareholders are also demanding answers with respect to the credit crisis, and those boards and CEOs who are being asked to respond are seeking advice from securities law attorneys.

Additionally, I am seeing a real trepidation in the markets at the present time, caused in part by the realization that not all AAA-rated securities are the same from a credit perspective; this concern is causing investors to be skittish, and as a result there has been a slowdown even with respect to non-mortgage related assets. For instance, the market for auction rate securities, which had been stable for so long that many market participants treated them as cash equivalent, dried up in a matter of weeks. Also, the market for leveraged loans and collateralized loan obligations, which had driven the buyout boom of recent years, has fallen off significantly. Investors, even sophisticated ones, have retreated to the sidelines until the volatility recedes.

The Enforcement Process

Enforcement investigations, which can be informal or formal, can be brought by the SEC under a number of statutes, such as the Securities Act of 1933 (15 U.S.C. § 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.), and the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 et seq.). Other government authorities who commence investigations include the DOJ, under several federal civil and criminal statutes ranging from fraud statutes (such as mail fraud (18 U.S.C. § 1341 (2008)) and wire

fraud (18 U.S.C. § 1343(2008)) to the Foreign Corrupt Practices Act (15 U.S.C. §§ 78dd-1, -2, 78ff); state attorneys general, such as the New York attorney general under the Martin Act (Gen. Bus. Law §§ 352 et seq. (N.Y. State Securities Law)); and self-regulatory organizations, such as the New York Stock Exchange and the Financial Industry Regulatory Authority.

Regardless of which agencies are participating in the investigation, the process typically proceeds along several stages: (1) receiving a subpoena or request for information, (2) gathering information and documents, (3) document collection and review for production to the government, (4) interviewing witnesses, (5) preparing witnesses to give testimony or proffers of information, (6) preparing a submission on the laws and facts to the government (which is called a Wells submission in the context of an SEC investigation), (7) settlement negotiations, and (8) the conclusion of the investigation and the institution of enforcement litigation proceedings, if any.

Legal Issues for Securities Clients

The main legal issues that I regularly advise on in this environment include (1) disclosure issues principally related to the appropriate accounting treatment for transactions and business trends, (2) other accounting issues, (3) issues related to whistleblower complaints, and (4) issues related to protecting attorney-client privilege and attorney work product. Many clients are facing difficult decisions with respect to how to correctly value certain assets, specifically those that have become illiquid due to the credit crisis. Clients want to make sure that the valuations that they assign to various asset classes are appropriate—not too aggressive, or too conservative—and, most importantly, that these valuations can be defended if questioned by regulators or shareholders. Other accounting issues in this area include the appropriate accounting treatment for derivatives and reserves. Derivatives received a lot of attention in the wake of the Enron, which had taken advantage of the complex treatment of derivatives under SFAS 133 to manage its earnings. The FASB recently issued SFAS 161 mandating enhanced disclosure in the derivatives area. Accounting for reserves, meanwhile, has traditionally been a challenging area for companies because of the judgment required for dealing with contingent losses under SFAS 5. This judgment by management and the inherent lack of certainty and

precision of reserves raises the risk the accounting could be manipulated to achieve a desired result.

Another important legal issue for securities clients is in the area of protecting privilege and work product. The recent decision in *U.S. v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), illustrates the tension between government regulators (who would ideally like to have full access to a company's information), and companies (who have justifiable concerns with respect to waiving privilege and work product protection when facing shareholder lawsuits). In *Stringer*, which involved parallel investigations by the SEC and the DOJ, the court upheld the waiver of the Fifth Amendment privilege by individuals who testified to the SEC and allowed the U.S. Attorney to use that testimony against the individuals in criminal prosecutions. This case shows how courts are open to granting third parties access to information provided by regulators during an investigation but which otherwise would likely be protected by privilege.

When I represent individual directors and officers, there is added complexity to protecting privilege because attorney-client privilege usually only extends to the company and not to third parties, such as directors and officers. In order to extend the privilege, we enter into a joint defense agreement with the company, which expands the privilege circle to parties with a common interest. In addition to a joint defense agreement, company counsel will often require a confidentiality agreement to limit outside counsel's use of documents to the defense of the current matter.

Whistleblower issues are also a concern for many securities industry clients. Recent cases have focused on which types of employee complaints deserve whistleblower protection under the Sarbanes-Oxley (SOX) statute *(see, e.g., Allen v. Administrative Review Board*, No. 06-60849 (Jan. 22, 2008)); in this environment companies and boards of directors are concerned about their obligations when they receive whistleblower complaints or other information about possible irregularities. Indeed, since the passage of SOX and the recent pronouncements by the government agencies in the area of corporate good citizenship and self-reporting, there has been an increased concern regarding how to properly respond to such complaints. In recent years, many of my clients who have received whistleblower complaints have been prompted to launch full-scale forensic investigations, only to find out

later (after incurring substantial expenses) that the complaint related to a minor issue that did not rise to a level that would truly concern shareholders—but it is often difficult for a board to make a determination regarding the significance of a complaint early on.

Whistleblower complaints are an obvious, although not exclusive, area that raises a broader question of when the board of directors needs to commence an internal investigation. Some factors a board should consider in making this decision are its legal obligation in the face of a red flag such as a whistleblower complaint (where, generally, if directors make a reasoned decision, they are unlikely to face personal liability); prudential factors involving corporate liability; possible reputational harm to the company and directors; whether the company is in a regulated industry; perspectives of the company's investors' and auditors' attitudes; alternatives to an investigation by the board; and whether the SEC or another governmental agency is already conducting or likely to conduct an investigation. With regard to red flags specifically, the board's evaluation should depend on the severity of the allegations or issues (including the nature of misconduct), the potential impact on the company's financial statements, the potential impact on public disclosures, and the involvement of senior personnel. The board should also consider the clarity of the evidence, any history of wrongdoing at the company, and the presence, if any, of an industry wide issue (e.g., stock option backdating).

Lastly, international securities issues have often come to the fore in recent times, particularly for multinational companies that are facing some of these same substantive issues, but with an additional cross-border element. It is often very difficult for multinational companies to navigate the regulatory and legal environment in both their home jurisdiction and the U.S. because different countries have different regulatory objectives and use different means for achieving those objectives. One particular area where this comes up is in accounting, where the international rules tend to be much less specific and more principles-based than U.S. rules. Other areas include privacy laws, issues relating to interactions with foreign officials under the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq.., and the independence of the board of directors.

It is imperative for lawyers and firms who are servicing clients in this practice area to have substantial expertise across a broad spectrum of these substantive issues—i.e., experts who have substantial experience with respect to disclosure issues and the cross-border issues discussed above. Having government experience, such as lawyers who have recently worked with the SEC, banking regulators, or in the prosecutor's office, is very helpful as it enables you to bring that perspective to bear when you are advising boards and management. Finally, you must have the resources to assist clients in whatever jurisdiction they are in, at whatever time they need your help—providing real-time advice is very important in this practice area, particularly when prompt disclosure might be needed, the board or senior management must make an immediate and important decision or if press reports are likely.

Looking to the Future

I do not foresee any major changes with respect to securities enforcement issues in the short term, given the priority being shown by the regulators to the credit crisis, although there may be some new areas of focus, just as the options backdating cases of 2006 succeeded the focus on derivatives and earnings management. As a result, there might be a new accounting issue that comes to the fore in any particular year, and the accounting standards setters themselves are examining some of the guidance in this area—for example, issues relating to consolidation and valuation.

I do expect to see some changes with respect to the issue of whistleblower responses and investigations within the next decade. Over the past five years, we have gone through a period where large, costly, time-consuming investigations became almost a de facto requirement for showing corporate good citizenship—i.e., proving that a company was doing the right thing in the eyes of both regulators and shareholders. My own perception is that the pendulum will start to swing back, and boards will be able to exercise business judgment, and make decisions in the best interest of their shareholders, without conducting that sort of investigation. Recent court decisions have reinforced the protection given to boards that follow a reasonable process in reaching a decision, *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), and regulators and Congress have begun to take actions that allow boards more flexibility when confronting these issues. *See, e.g.*, The Paul J.

McNulty Memorandum regarding the Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), The Statement of the SEC Concerning Financial Penalties (Jan. 4, 2006)).

Working with Clients on Securities Issues: Key Questions

When working with a client on a securities investigation, I usually start out by trying to get an understanding from senior management or the board with respect to what they view as their high risk areas—in other words, what types of risks keep those executives up at night. These risks can be operational (such as monitoring for unauthorized activities), financial (such as hitting earnings targets), legal (such as pending litigation), or compliance (such as managing information barriers). I will then evaluate the compliance and risk functions within the client's organization, so that I can understand where the key reporting lines are, and determine how much emphasis, priority, and visibility is given to each compliance and risk function. Similarly, I will ask the client about their internal controls, such as approvals, verifications, reconciliations, security of assets and segregation of duties. It is important for me to have a picture of the organization's risk management function and internal controls, so that when I gather facts in the defense of the client or in conducting an investigation on behalf of the board, I will have an understanding of how much reliance I can place on the client's controls, and the people in the company.

I also always explore their relationships with their auditors, and any securities issues that have been discussed with or raised by the auditors. For example, in the course of evaluating the client's internal controls I will ask the client early on about communications from the auditors to the audit committee or management, particularly about any weaknesses they have found, such as inadequacies in reporting or policies and procedures.

I will also speak with the key personnel in the business unit(s) that are relevant to the issues at hand—e.g., when discussing the client's accounting issues, I try to get a sense from senior management and the board of the strength, size, and quality of their finance operation. I also look at the compliance and legal function in the area of whistleblower complaints. Essentially, when conducting an investigation, I want to obtain the client's perspective of the risks, weaknesses, and strengths within their organization

in relation to these issues, so that when I develop a work plan I will know where I can leverage the company's existing processes or functions, and I will also know which areas require me to perform a detailed testing or review.

Managing Client Expectations in a Securities Investigation

When I am conducting investigations on behalf of a client in the securities area, I believe in always shooting straight, and telling it as I see it. Of course, many clients would prefer to hear that there is nothing wrong or that the allegations can be reviewed quickly and with minimal resources; while conversely, lawyers sometimes are caught in the trap of saying the sky is falling where they recommend responses that are not proportional to the potential issues. However, I believe it is important to give the client my best assessment of their situation based on what I currently know (or don't know)—and to make clear that this assessment may change over time and suddenly, as new information becomes available or the focus of the investigation shifts. Therefore, I keep in frequent contact with the client, and provide regular updates that help to manage client expectations.

I also believe that it is very important to give the client a realistic assessment of the time and cost of a securities investigation, so that the directors can make choices about the depth of the investigation, including weighing trade-offs between thoroughness, speed, and expense. Clients are understandably worried about making sure that they stay timely with respect to their financial reporting, because some of the issues leading to a securities investigation (such as those relating to valuation of assets or financial statement errors) may prevent a company from making public filings, and as a result, lose access to the debt and equity markets. Therefore, my clients often push me to finish an investigation before the next reporting cycle, which results in a great deal of time pressure. I find that frequent communication in terms of giving the client regular updates as to time and cost estimates is very important—and I try not to overstate or understate how long something will take, or how much it will cost.

I also believe that it is important to engage the client with respect to the substance of the investigation. I find that directors are typically interested in these issues, as it is generally their responsibility to make informed decisions about the scope of the investigation, especially if presented with any

evidence that suggests a broadening of scope may be appropriate. At the conclusion of the investigation, directors assess current personnel and oversee implementation of remedial measures. Finally, they need to be comfortable with the conclusions we reach in the investigation, as those conclusions will be taken as the directors' own.

Directors can also be very helpful in terms of bringing their perspective and knowledge of the history of the company to bear on the investigation. In order for a company to get credit from the government for a board investigation, as explained by the SEC's Seaboard report. Release No. 34-44969 (Oct. 23, 2001), lawyers who conduct the investigations have to be independent of the client; therefore, we often do not know much about the company or its business at the start of the process. The company's directors can give us that window and perspective, and can help contribute to and guide our work. This process also helps to manage the client's expectations, because as we work together the client gets a window into what we are finding, and where we are in the process.

In addition to engaging with the company's directors, we also interact with management. This can be a difficult aspect to the investigation because the investigation must be independent to satisfy the board, shareholders, auditors, and regulators—the people who potentially participated in wrongdoing cannot participate in the investigation or be advised of its progress, and often the supervisors of such people also cannot participate or be advised of the investigation's progress. That said, the company still needs to conduct its business while the investigation is pending, which can be frustrating to management given their inability to speed the progress. Additionally, if the company is in the position to make financial disclosure during the investigation, then management needs to know enough about what the investigation is finding to permit the preparation of adequate and accurate disclosure, including certifications and sub-certifications by management. Finally, at some point as the investigation progresses, management needs information sufficient to devise and implement appropriate remedial measures.

Common Elements in an Investigation

At the start of the investigation, I identify the employees or groups of employees who must be instructed to preserve their relevant documents, such as e-mails and internal reports and presentations. My team then collects those documents and conducts an extensive document review to gather the relevant facts, which vary depending on the transactions at issue, but generally involve which personnel were involved and what senior management and the board were told and when, what the rationales for the transactions in question were, and what approvals were given and what disclosure was considered and made.

Secondly, I interview all of the people within the company that have significant relevant information; this is an essential step whether I am representing a company in a government investigation, or whether I am conducting an internal investigation. It is important to establish a good relationship and rapport with the company's employees, because we need to be able to conduct interviews in such a way that we can learn all of the facts. We want the interviewees to feel comfortable about talking with us; and we need to develop a working relationship with in-house counsel, because they can assist us in gathering information. If we are representing the company in a government investigation, it is especially critical that we gain the confidence of the in-house lawyers and employees so that we can respond quickly and effectively to any government agency requests.

Over the course of an investigation—whether I am conducting it on behalf of the board or whether it is a government investigation—disclosure issues will invariably come up—i.e., when do you disclose its existence and how much do you disclose about an investigation? Whether you disclose what you are finding and how much information you provide are critical issues that must be decided by senior management or the board. Some questions that management often considers are whether the matter concerns financial statements or other disclosures that the public is currently relying on, whether the matter concerns something that ordinarily would be addressed in an upcoming public filing, whether there is a public interest in the issue, how great the risk is that the company will be asked about the matter or news of the investigation will leak, and how the market will react to news that the board is conducting an investigation. Other considerations include

whether the company has undertaken to provide updates, how much is known, how disclosure will affect the progress of the investigation, how certain the company is that what it might disclose is correct, whether the market is clamoring for an update, and any regulatory pressure there is for disclosure.

A final element of internal investigations pertains to reporting and work product—i.e., when we report our findings, to whom do we report, and what form does it take? Simply put, what do we do with our work product? When conducting an investigation on behalf of a board of directors, I will often need to meet with or provide updates to the SEC, especially if the company is investigating an issue currently confronting the market. My mandate from the board involves not only determining what happened, but also dealing with the SEC. It is important to the board that the SEC finds the investigation credible. This may often allow the SEC to leverage off my investigation and wait to make numerous and burdensome demands on the company.

International Securities Issues

International companies face some unique securities and legal issues in the area of securities investigations. First and foremost are often privacy concerns; in Europe, the privacy laws are quite different and generally much stricter than those in the U.S. Therefore, a securities lawyer must be able to navigate those privacy laws in a way that still allows you to learn the facts of the issue, and allows you to be cooperative with the SEC and respond to their requests. For instance, under the E.U. Data Protection Directive there is a broader definition of "personal data" in relation to employees, such that corporate e-mail identifying the names of the senders and recipients in the e-mail addresses is difficult to transfer, collect, and process during an investigation.

A second key issue for international companies, particularly in Europe, is data collection. U.S. companies that have previously dealt with whistleblower allegations of impropriety leading to investigations are used to the data collection process—what needs to be done, and the time and cost associated with collection. However, that is not yet the case for many international companies, and personnel from foreign locations may be more

sensitive about U.S. lawyers coming to their office to collect documents. Therefore, this area requires a great deal of focus and attention for international companies.

Finally, the interplay of regulators is becoming increasingly important for international firms. There is more cooperation between regulators such as the SEC and the Financial Services Authority (FSA) in the U.K., and U.S. and Canadian regulators also regularly share information and consult with each other. At the same time, each set of regulators has their own agenda, and will be evaluating their own aspects of the case. Therefore, it can be much more challenging to navigate these issues when you are dealing with a host of international regulators, as opposed to when you are only dealing with the SEC and the DOJ.

Key Political Factors Impacting State, Federal or Global Securities Issues

The current key political factors in my practice affecting state, federal or global securities enforcement issues are the upcoming elections in the United States, and the focus that the government has brought to the subprime crisis. The fact that the government is taking active and unprecedented steps to alleviate this crisis greatly affects the securities issues with which I deal. For example, the recent JP Morgan acquisition of Bear Stearns depended in part on relief obtained from the SEC in a number of areas, including the Advisors Act, requirements relating to broker-dealer registration under the Exchange Act, and registration under the Securities Act for sales of certain securities. In a normally functioning market, or in a time when there was not such a crisis, that relief may not have been obtained.

Increased scrutiny from the White House, Congress, and the current political campaign have led regulators at the federal and state level to become very active with respect to securities compliance, and they are investigating and questioning a variety of market participants to determine if they should be bringing securities cases. For instance, Senator Grassley recently asked the GAO to conduct an investigation into why the SEC declined to bring an enforcement action against Bear Stearns prior to its acquisition by JP Morgan. Indeed, this trend is driving the work in this

practice area at the present time—often more so than private litigation, which is usually the largest factor in how my clients approach potential issues. Today, the regulatory arena is equally important, and I believe the regulatory arena is being greatly affected by these political factors.

Key cases and statutes that are currently impacting this practice area include SOX and cases dealing with government tactics in these investigations, such as the *Stringer* decision which dealt with collaboration between the SEC and the U.S. Attorney General and the KPMG case, *US v. Stein*, 435 F.Supp.2d 330 (SDNY 2006), which dealt with prosecutors pressuring a company to refrain from paying for the legal representation of its employees. The Justice Department detailed key actions and guidance with respect to their approach to dealing with companies that are involved in securities investigations in the McNulty Memo. Paul J. McNulty Memorandum regarding the Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006). The memo provided a framework for how and when the DOJ will ask a company to waive attorney-client privilege. It also stressed the oversight function of directors and the existence and adequacy of a company's preexisting compliance programs as considerations for whether to prosecute. In 2006, the SEC published a statement explaining the factors it considered in deciding whether to impose corporate penalties, such as the presence or lack of remedial steps by the company and the company's cooperation with the SEC and other law enforcement agencies, including whether the company self-reported the violation. Statement of the SEC Concerning Financial Penalties (Jan. 4, 2006).

Recommended Best Practices in Securities Compliance

Fortunately, many companies have already developed an appreciation that it is important to place a corporate priority on their risk systems and functions in terms of visibility and providing reporting lines that have respect at all levels of the organization. It is especially important to ensure that the risk and compliance areas have the resources that they need. In this market environment, companies are also well served to put more emphasis on allocating resources that will help to ensure that they have the appropriate valuation and accounting models in place—and the right people and systems in place to support those models.

A strong internal audit department can be a major ally to the compliance infrastructure of a company in this environment by identifying high-risk areas through selective testing and periodic audits to evaluate whether controls are operating as intended. Also, the results of an audit can help boards and senior management re-evaluate and adjust their company's testing level—i.e., should a company speed up the testing cycle to make it more timely? Does it have the right people in place in its various compliance areas? In order to assist clients in these areas, we, as outside counsel, monitor all accounting practices related to financings; valuation pronouncements; and earnings and revenue type accounting issues. On the legal side, we very closely monitor court cases that deal with issues relating to privilege and work product, because the results of such cases will affect how we conduct an investigation or represent a company before regulators. Often, companies are under pressure from regulators and auditors to waive privilege, although the climate in this respect has improved dramatically over the past few years. There has been a lot of attention and a number of rulings in this area differ in various jurisdictions; therefore, we must always stay current so that we can appropriately advise clients on issues such as waiver. Some issues the board might consider in order to protect privilege include having a corporate resolution about the scope of the investigation and the lawyers' role, the content of the lawyers' engagement letter, who hires experts, and the format of interview notes and memoranda.

Agency Cooperation

As previously mentioned, I am seeing an increased level of cooperation between the regulatory agencies that govern these areas. I primarily deal with the SEC and the DOJ, although banking regulators are also involved in some cases. Indeed, it is now almost a given that both the SEC and the DOJ (through the United States attorneys) will investigate a securities matter; they cooperate by having informal meetings, and attending testimony together, and the level of cooperation and coordination is increasing.

Although it is standard operating procedure for the SEC not to comment on the existence of a U.S. Attorney investigation (and vice versa), given the level of cooperation and attention both agencies share on these issues, we generally operate—and have our clients operate—under the assumption

that there will be cooperation between those agencies with respect to a securities investigation. That assumption should affect how you deal with the SEC in the context of any case, and how much information you share, particularly with respect to privilege and work product issues. Additionally, companies often conduct investigations in the shadow of private litigation, which introduces further risks when sharing information and dealing with privilege and work product issues.

The other major effect of this interagency cooperation pertains to how it relates investigations of individuals. The pressure is always higher when an individual learns that an FBI officer will be participating in an interview. The consequences of a parallel criminal investigation in addition to a civil investigation also significantly raise the stakes for an individual. Consequently, employees are now much more likely to have their own counsel in securities investigations, resulting in cost increases for the client; more time needed to prepare for the interview; and often greater distractions to the employee from their business.

Final Thoughts

I believe that the most important legal skills that are required to handle securities law issues in government investigations include expertise across a variety of areas, including accounting, disclosure, business, and international regulations. At the same time, you need to bring the appropriate judgment and temperament to bear on the counsel you offer your client. Having the patience and sensitivities to be able to act quickly, analyze complex problems, and be an effective advocate is very important, and the ability to identify the key issues and facts from the large quantities of data that you typically gather in these investigations is very critical. You must also be comfortable working in the different legal regimes in this area, and have some familiarity with international regulators and the issues they are focusing on. When dealing with these complex accounting issues, either abroad or in the U.S., being well versed in those substantive areas is very important.

Therefore, the most important piece of advice that I could offer to other attorneys concerned with common issues in securities law would be to stay current and develop an understanding of the business aspects behind the

securities issues that relate to corporate financings and transactions. It is truly invaluable to have an understanding of the transactions that drive the results and performance of a company—and which are inevitably the transactions that are at issue in a securities investigation.

Related Resources

Case Law:

1. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)
2. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006)
3. *In re Abbott Laboratories*, 325 F.3d 795 (7th Cir. 2003)
4. *In re Enron Corp. Secs., Derivative & ERISA Litig. v. Enron Corp.*, 235 F. Supp. 2d 549, (S.D. Texas 2002)
5. *In re Oracle Corp., Derivative Litig.*, 2003 WL 21396449 (Del. Ch. June 17, 2003)
6. *In re Royal Ahold N.V. Secs. & ERISA Litig.*, 230 F.R.D. 433 (D. Md. 2005)
7. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)
8. *In re Veeco Instruments, Inc. Secs. Litig.*, 2007 U.S. Dist. LEXIS 5274 (S.D.N.Y. 2007)
9. *Merrill Lynch v. Allegheny Energy Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004)

Regulatory Guidance:

1. U.S. Commodity Futures Trading Commission Memorandum regarding Cooperation Factors in Enforcement Division Sanctions Recommendations, dated Aug. 11, 2004 http://www.cftc.gov/stellent/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf

2. NYSE Information Memorandum Regarding Cooperation, dated Sept. 14, 2005
   http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525707C004C6DE0/$FILE/Microsoft%20Word%20-%20Document%20in%2005-65.pdf

3. Remarks Before the SEC Speaks in 2007, Commissioner Paul S. Atkins, February 9, 2007
   http://www.sec.gov/news/speech/2007/spch020907psa.htm

4. FINRA Sanctions Guidelines
   http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf

Legislation:

1. The Attorney-Client Privilege Protection Act of 2007
   Senate Version:
   http://thomas.loc.gov/cgi-bin/query/z?c110:S.186:
   House Version:
   http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.3013:

Industry Guidance:

1. Committee of the Sponsoring Organizations of the Treadway Commission ("COSO") Executive Summary of Internal Control over Financial Reporting – Guidance for Smaller Public Companies
   http://www.coso.org/Publications/erm_sb/SB_Executive_Summary.pdf

2. COSO Executive Summary of Enterprise Risk Management – Integrated Framework
   http://www.coso.org/Publications/ERM/COSO_ERM_ExecutiveSummary.pdf

3. Institute of Internal Auditors ("IIA") Position Statement on the Role of Internal Auditing in Enterprise-wide Risk Management
   http://www.theiia.org/download.cfm?file=283

Robin M. Bergen is a partner based in the Washington, D.C. office of Cleary Gottlieb. Ms. Bergen's practice focuses on SEC investigations and regulatory enforcement matters, structured finance, private investment funds, international securities offerings and cross-border financings. She also has extensive experience in the regulation of investment companies and investment advisers, and corporate matters including corporate governance and compliance issues related to financial institutions, investment banks, and other corporate clients.

Selected relevant experience in enforcement and regulatory matters includes acting as:

- *Counsel to several Fortune 500 companies and senior officers and directors in connection with SEC options backdating investigations*
- *Counsel to several Wall Street investment banks in various regulatory investigations*
- *Counsel to several public companies and senior officers in connection with SEC investigations involving allegations of accounting fraud and other misconduct*
- *Counsel to the independent directors of Sirva Inc. in an internal investigation relating to earnings management*
- *Counsel to the independent directors of Verisign Inc. in an internal investigation relating to options backdating*

In the structured finance area, Ms. Bergen regularly represents underwriters and investment managers in collateralized debt obligation transactions and complex financial product offerings.

Ms. Bergen is distinguished internationally as one of the leading lawyers in securitization, derivatives and structured products by both Chambers Global: The World's Leading Lawyers for Business *(2008), and* Chambers USA *(2007).*

Ms. Bergen speaks regularly on issues relating to securities enforcement, government investigations, and structured finance. Ms. Bergen has published on regulatory matters relating to investment companies and investment advisers.

Ms. Bergen joined the firm in 1994 and became a partner in 2003. She received a J.D. degree from New York University School of Law in 1994 and a B.S. degree, with distinction, from the University of Virginia in 1991.

Ms. Bergen is a member of the Bars in New York and the District of Columbia.