

Morgan Lewis

review

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2011 Year in Review: Asset Management Roundtable

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Agenda

- 2011 Highlights
 - Key SEC Enforcement Developments
 - SEC Statistics
- Current Enforcement Priorities and Related Cases
- Regulatory Agenda
 - Looking Ahead to 2012

2011 Highlights: Key SEC Enforcement Developments

- First complete fiscal year since Division of Enforcement's comprehensive reorganization
 - Delegated authority to issue formal orders of investigation
- Leadership, staffing and cases brought by specialized units
 - Asset Management Unit
 - Specialized personnel in OCIE and Enforcement
 - Technology resources and analytical tools
- Increasing focus on individuals
- Judicial criticism of SEC settlement practices
 - Changes to “no admit or deny policy”
- SEC efforts to enhance its penalty authority
- Use of negligence rather than scienter-based fraud charges

2011 Highlights: Key SEC Enforcement Developments

- Cooperation initiatives
- Dodd-Frank whistleblower provisions
- Developments in administrative proceedings
 - Penalties in cease-and-desist proceedings
 - Collateral bars
- Immunity requests

2011 Highlights: SEC Statistics

- 735 enforcement actions (681 in FY 2010)
- 578 formal investigations opened (531 in FY 2010)
- 134 criminal actions relating to SEC cases (139 in FY 2010)
- \$928 million in fines (\$1.03 billion in FY 2010)
 - 10 cases represent approximately 46% of fines
- \$1.878 billion in disgorgement orders (\$1.82 billion in FY 2010)

2011 Highlights: SEC Statistics



- **146** cases against investment advisers and investment companies
- **30%** increase over FY 2010
- **92%** increase from FY 2009
- 112 cases against broker-dealers (70 in FY 2010)
- Cases against investment advisers, investment companies and broker-dealers represent 35% of SEC's total enforcement docket

Current Enforcement Priorities and Related Cases

- Compliance programs and supervisory structure, including the adoption and implementation of written compliance policies and procedures and the conduct of annual reviews under Advisers Act Rule 206(4)-7
 - “Not all compliance failures result in fraud, but many frauds take root in compliance deficiencies . . . That simple truth underlies our renewed focus on identifying and charging firms and individuals that fail their legal obligations to maintain adequate compliance programs.”
- Mutual fund fee arrangements, including board oversight and the 15(c) contract renewal process
 - *In re Morgan Stanley Investment Management, Inc.* (Nov. 16, 2011)
- Turn key mutual fund solutions and inexperienced advisers

Current Enforcement Priorities and Related Cases

- Failure to disclose errors
 - *In re AXA Rosenberg Group LLC* (Feb. 3, 2011)
- Performance claims, including aberrational performance and portability of performance
 - *Aberrational Performance Inquiry*
 - “The extraordinary returns reported by these advisers and portfolio managers were, in most cases, too good to be true . . . We are applying analytics across the investment adviser space – beyond performance and beyond hedge funds.”
- Representations to clients and investors relating to education, experience and past performance

Current Enforcement Priorities and Related Cases

- Insider trading, including the use of expert networks, information barriers for material non-public information and front running
- Private equity funds and related conflicts, including
 - Use of placement agents and other gatekeepers
 - Preferential terms in side letters and co-investing
 - Relationships with portfolio companies
 - Investing at different levels in the capital structure
- Valuation of illiquid and hard-to-value assets, including compliance with pricing policies
 - *In re Morgan Asset Management, Inc. and Morgan Keegan & Company, Inc.* (June 22, 2011)

Current Enforcement Priorities and Related Cases

- Market manipulation, including through false rumors, “marking the close” in an attempt to inflate performance and short sales
- Due diligence on investment decisions
- Misallocation of investment opportunities
- Conflicts of interest and inaccurate or inadequate disclosure
- Misappropriation of client assets and fraudulent trading schemes

Regulatory Agenda: Looking Ahead to 2012

- Uniform fiduciary standard of conduct and IA/BD harmonization
- Money market funds
- Use of derivatives by funds
- Municipal advisor registration
- CFTC Rule 4.5
- DOL fiduciary rules
- FINRA suitability
- FINRA guidance on complex products



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