

Demystifying the SEC and CFPB Enforcement Processes

Scott H. Kimpel, Partner

Ronald Rubin, Partner

Webinar Presentation – July 31, 2013

Webinar Presenters



Scott H. Kimpel
Partner
(202) 955-1524
skimpel@hunton.com



Ronald Rubin
Partner
(202) 955-1987
rrubin@hunton.com

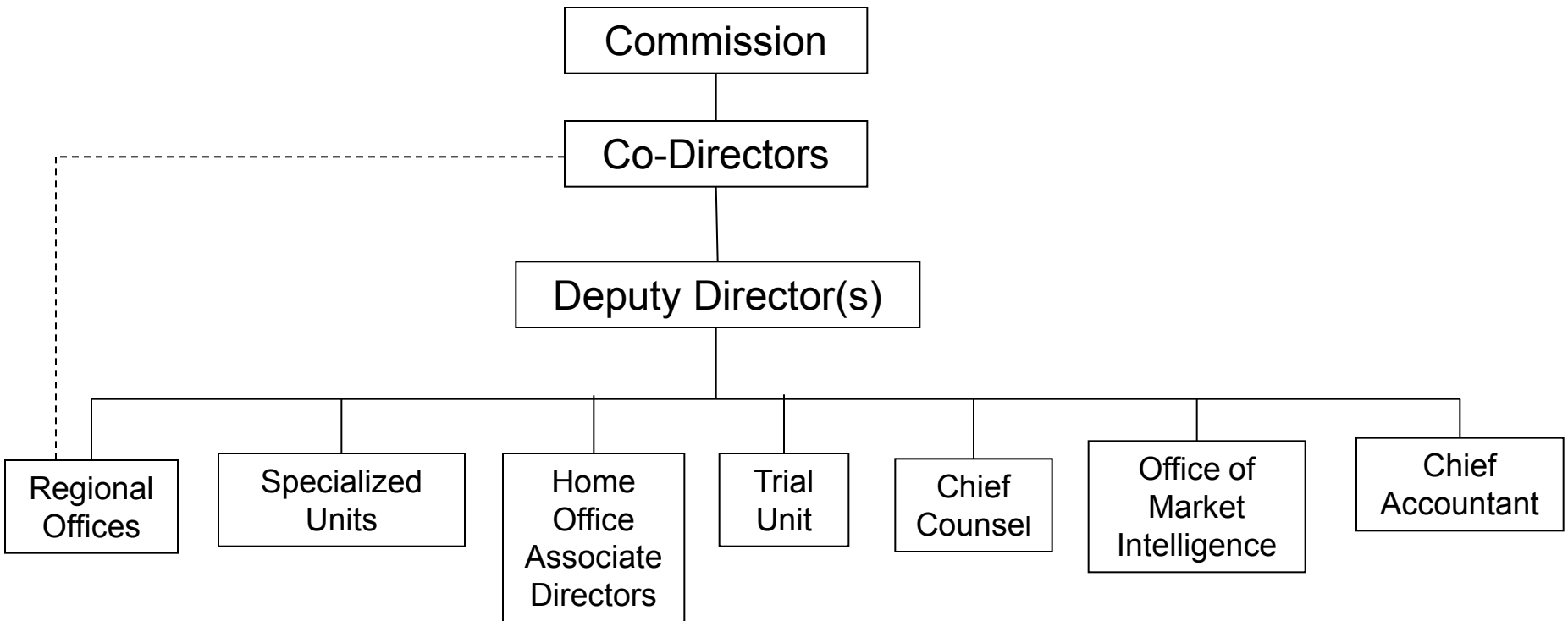
Overview – Scope of the Webinar

- How are the enforcement units at the two agencies organized and managed?
- What are the current enforcement priorities?
- Who decides to open an investigation, and what is the basis for that decision?
- What are some strategies to avoid becoming the subject of an investigation?
- How does a typical investigation unfold?
- What do I do if my company gets a subpoena (SEC), Civil Investigative Demand (CFPB), or other request to produce documents?
- What are some strategies for petitioning the Director (CFPB)?
- My company just uncovered a potential violation of law; should we self-report?
- How do the Wells process (SEC) and the NORA process (CFPB) compare?
- What are some strategies for settlement negotiations?
- What does it mean to settle on a “neither admit nor deny” basis?

Introductory Note

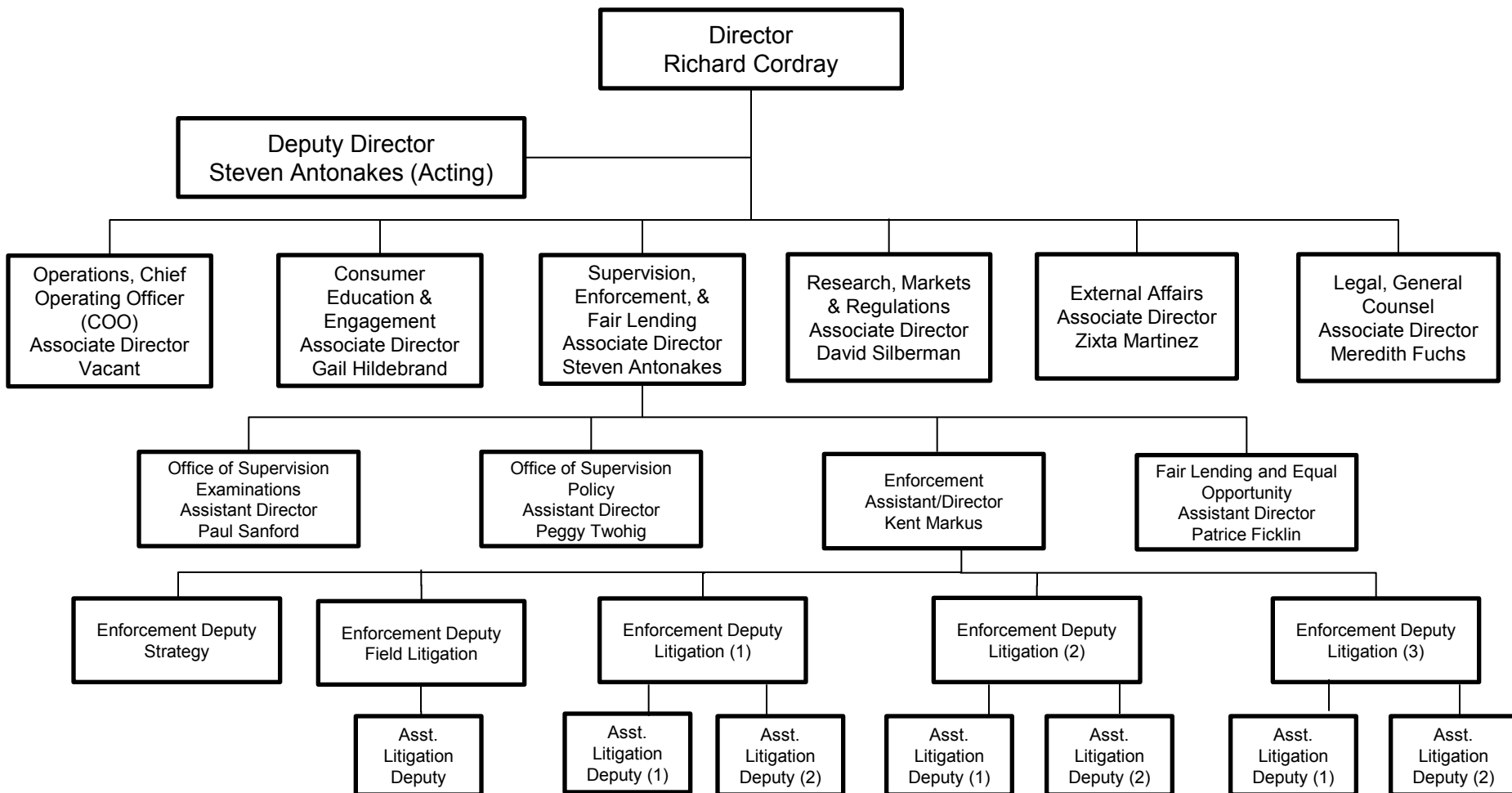
- This webinar is designed to provide a general overview of the subject matter.
- Because each case is unique, the advice customized for a particular set of facts and circumstances will differ from client to client.
- We do not intend to imply that there is only one way of responding to the SEC or CFPB, or that there is only one best practice for a particular enforcement topic.

Organization of SEC Division of Enforcement



Note: Enforcement Division has approximately 1300 employees and proposed budget of \$494 million.

Organization of CFPB



Current Enforcement Priorities (SEC)

- Asset managers* (investment advisers, investment companies, private funds)
- Market abuse* (market manipulation)
- Structured products* (CDS, CDO/CLO, other securitized products)
- FCPA*
- Municipal Securities*
- Financial Reporting and Audit**
- Insider Trading
- Microcap Fraud**
- Other Frauds (offering frauds, ponzi schemes, shell companies)

* Denotes specialized unit

** Denotes newly formed task force

Current Enforcement Priorities (CFPB)

- Debt collection
- RESPA
- Vendors
- Fair Lending – Auto dealer participation
- Older American UDAAP
- Military UDAAP
- Credit cards

Sources for Investigations (SEC)

- News media
- Referrals from Finra, SROs and exchanges
- Public tips/complaints/referrals (whistleblowers)
- Referrals from other SEC offices/divisions
- Referrals from other regulators
- Coordinated operations with FBI
- Increasing use of proprietary surveillance techniques
- Office of Market Intelligence as clearing house

Sources for Investigations (CFPB)

- Issue Groups
- Strategy Team
- Complaints
- Government studies
- Referrals from other regulators
- Co-operation?

Opening an Investigation (SEC)

- Matter under inquiry (“MUI”)
 - evaluate preliminary information and determine whether investigation warranted
- Informal investigation
- Formal investigation (subpoena power)
- Investigations non-public; public company must assess whether it should voluntarily disclose existence of investigation to shareholders

Opening an Investigation (CFPB)

- No informal investigations
- Enforcement Action Process

Strategies to Avoid Becoming Subject of an Investigation

- Tone at the top and culture of compliance
- Plain English code of conduct
- Robust training program for employees
- Well-documented procedures
- Strong internal controls/disclosure controls
- Empower chief compliance officer
- Encourage use of compliance hotlines/credible WB process
- Retain outside counsel, auditors and other advisors with appropriate experience level

Investigative Process (SEC)

- Staff will request documentary evidence and take witness testimony (voluntary vs. subpoena)
- Staff may review books, records and trading data
- Staff will consult subject matter experts in other SEC offices/divisions
- Staff will research public sources (e.g., press releases, new media, public filings)
- Staff may hire outside experts
- Staff will share investigative file w/criminal authorities / other regulators
- Staff will communicate with defense counsel

Investigative Process (SEC)

- If Staff believes sufficient basis to proceed with enforcement action, will invite defense counsel to make “Wells Submission”
- Factors consider by Staff in recommending enforcement action:
 - seriousness of wrongdoing
 - level of scienter
 - novelty of case
 - messaging of case
 - relief sought
 - tactical considerations
- If Staff wishes to take formal action, will prepare “action memo” to Commission making recommendation
- Commission must vote to bring suit

Investigation Process (CFPB)

- Managing examination process
- No opportunity to head off non-examination investigation
- Starts with a bang (big CID)

Responding to a Subpoena (SEC)

- Put in place appropriate “litigation hold” protocols to preserve written and electronic documents
- Read accompanying formal order carefully for clues about case (SEC)
- Be upfront with SEC Staff about timing for production
- Follow SEC conventions for labeling documents, Bates stamps, and other guidelines for electronic submissions
- Privilege logs must conform to certain standards (SEC)

Responding to a Civil Investigative Demand (CFPB)

- Fewer, longer CIDs
- CIDs include interrogatories
- Very short timeline
- 10 days: Meet-and-confer
- 21 days: Petition Director to limit CID
- Should bring IT expert to meet-and-confer
- Must object at meet-and-confer or lose right to petition Director

What are some strategies for petitioning the Director (CFPB)?

- Manage enforcement attorneys – petition to Director will almost certainly fail
- Know CFPB enforcement attorneys and their supervisors
- Must have specifics to convince them of burden arguments
- Tendency to be very rigid and formal

My company just uncovered a potential violation of law; should we self-report?

- Difficult question; fact and circumstance analysis
- Agencies encourage self-reporting/cooperation
- Assess severity and magnitude of potential violation
- Weigh need for internal investigation
- Assess breadth of remedial measures
- Consult agencies' cooperation policies

Wells process (SEC) vs. NORA process (CFPB)

- Strict time and length limitations (CFPB)
- Not an invitation to negotiate settlement (CFPB)
- CFPB much more likely to deny NORA submission altogether – viewed as discretionary
- Also discretionary for SEC Staff, but usually allow submission absent extraordinary circumstances (e.g., ongoing fraud) if defense is generally cooperative (SEC)
- More flexibility in time and length through use of appendices and white papers (SEC)
- Primary techniques for presenting defense case to SEC commissioners

Strategies for Settlement Negotiations (SEC)

- Do you litigate or do you settle?
- Federal district court vs. administrative law judge
- Look to prior precedents
- Monetary penalties
- Disgorgement of ill-gotten gains
- Scope of injunctive relief
- Scope of O&D/industry bars
- Scienyer vs. non-scienter charges
- Effect of settlement on disqualification

Strategies for Settlement Negotiations (CFPB)

- Same remedies available in administrative procedure as in federal lawsuit
- Much less give and take in negotiations and drafting settlement documents
- Less precedent for settlement parameters
- Size matters

Settling on a “Neither Admit Nor Deny” Basis

- Overview
- Effect on criminal liability
- Effect on D&O insurance
- Effect on private litigation
- SEC new policies

Questions



Scott H. Kimpel
Partner
(202) 955-1524
skimpe@hunton.com



Ronald Rubin
Partner
(202) 955-1987
rrubin@hunton.com