

ROPES & GRAY AND THE EASTERN DISTRICT (NY) ASSOCIATION SPONSOR PANEL ON

Current Enforcement Trends Resulting From the Subprime Market

In the wake of the indictment of two Bear Stearns hedge fund managers for securities fraud, more than 90 leaders from the investment community and white collar defense bar came together last week in New York to hear U.S. Attorney for the Eastern District of New York, Ben Campbell, speak on the trends in enforcement on subprime issues. Joining Mr. Campbell to discuss this timely topic was Jay McMahon, the Eastern District's Business and Securities Fraud Chief, who also oversees the District's Mortgage Fraud Task Force, which participated in "Operation Malicious Mortgage"—a nationwide enforcement action that has resulted in 400 arrests. Rounding out the panel was Robert Keyes, an Assistant Regional Director for Enforcement in the SEC's New York Regional Office. Ropes & Gray's Government Enforcement Practice Group co-sponsored the panel, along with the Eastern District Association of former EDNY Assistant U.S. Attorneys. Jason Brown, a partner in Ropes & Gray's Government Enforcement Practice Group, moderated the lively panel discussion and Q&A session that followed.

The panelists discussed current trends in investigations and prosecutions related to the subprime market/credit crisis, including theories of prosecution and factors that determine criminal versus civil resolution. Of particular note, Mr. Campbell stressed that although the investments involved are fairly complicated, the U.S. Attorney's Office is not advancing into new territory, but rather focusing on the types of cases commonly found in the securities area (i.e., similar to those seen in the wake of the dotcom crash). Mr. Keyes echoed a similar sentiment with respect to the SEC's investigations. For example, in investigating individuals and investment managers, the government is exploring cases involving insider trading, false statements made to investors related to performance and/or associated investment risks, and false statements in SEC filings. In investigating corporations, the government is exploring claims involving failure to disclose risks in offering memoranda or in SEC filings, accounting fraud claims associated with failing to adequately write down a portfolio, and misrepresentations made in connection with the sale or resale of subprime securities. Mr. Campbell indicated that the U.S. Attorney's Office would be particularly interested in individuals who deliberately manipulated or ignored pricing information in valuing subprime securities, as well as those who failed to properly disclose the deterioration of the assets.

Mr. Keyes noted that the issue was one of international scope, and that the SEC's response would likely involve enforcement actions and further regulation. According to Mr. Keyes, the SEC's intra-agency subprime task force currently has dozens of active investigations. Mr. Keyes indicated that a significant area of inquiry for the SEC is how people responded once the crisis struck—what investors were told about the performance of their investments, the risks associated with the subprime related strategies, and how security valuations took into account the unique market conditions.

The panel concluded by emphasizing that prosecutors are in the early stages of many of these investigations, and have just begun observing the "tip of the iceberg." Mr. Campbell noted his belief that this issue will be the subject of prosecutions for "years to come." The panel did stress, however, that as with many investigations, and despite the recent criminal indictments, many if not most of these cases will ultimately be resolved civilly rather than criminally, with the principal deciding factor being the existence of knowing fraud over the application of bad judgment.

Over the last year, Ropes & Gray has assembled a multifaceted team of lawyers from a variety of practice groups, as well as a number of outside experts, to assist a wide range of clients in dealing with issues arising out of the subprime crisis. For example, the firm is conducting internal investigations involving complicated subprime investment strategies and associated risk management issues, internal

controls, and investor disclosures. The firm is also responding to regulatory inquiries made by a full spectrum of federal and state regulators (e.g. the Fed, SEC, DOL, and FINRA) on behalf of international money managers and broker dealers, and defending clients in civil actions brought in federal and state courts associated with losses arising out of investments in subprime-related securities.

Ropes & Gray's Government Enforcement Practice Group is one of the leading enforcement defense practices in the country, providing valuable services both before and after the commencement of enforcement activity. It works with Ropes & Gray's Securities Litigation and Enforcement Practice Group, and draws on the firm's nationally recognized Investment Management Practice Group, as well as other internal lawyers and practices, to resolve our clients' complex issues arising out of the subprime crisis. The firm represents institutional money managers, large mutual fund complexes and their trustees, and other financial institutions in criminal, civil, and administrative investigations conducted by federal and state law enforcement authorities and in related civil litigation across the country.

Contact Information

If you have any questions concerning the panel discussion, or subprime issues generally, please contact one of the attorneys listed below or your regular Ropes & Gray attorney.

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