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# Setting the Right Tone On Financial Crimes

**Katherine Goldstein, partner with Akin Gump, served as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York for more than a dozen years, including several years as the chief of the Securities and Commodities Fraud Task Force, before bringing her expertise to the private sector. We discussed what companies can do to avoid getting involved in everything from traditional financial crimes like insider trading to newer kinds of fraud related to the COVID-19 pandemic.**

**CCBJ: Please tell us about your experience working as a federal prosecutor.**

**Katherine Goldstein:** It was an extraordinary professional experience. The Securities Unit in Manhattan attracts some of the most experienced prosecutors in an office that's already full of incredibly talented people. As the unit chief, I supervised between 15 and 20 prosecutors and investigators. It was really a privilege to hold the position.

Being headquartered in Manhattan, with jurisdiction over the Southern District, really gives the unit its mission and its purpose, which is to keep an eye on the capital markets. The focus is on crimes like insider trading, accounting and disclosure fraud, valuation issues, and all manner of investor frauds. Increasingly, those offenses intersect with cybersecurity issues. So it really deals with every kind of traditional and also cutting-edge issue that arises on Wall Street.

Another really important aspect of the job is that the chiefs of the unit are liaisons with our law enforcement partners in the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Department of Financial Services, the New York District Attorney's Office, the Federal Bureau of Investigation, and all manner of other law enforcement agencies. You learn to work closely with those agencies, you learn their missions, you learn their people, and you learn how to effectively bring cases together.

**What are some trends you've noticed in the investigation and prosecution of insider trading and other securities fraud issues over the past 10 years?**

When I was at the U.S. Attorney's Office, from 2004 to 2017, the office saw the biggest increase in insider trading enforcement since the Boesky Milken days in the early to mid 1980s. There were more than 100 prosecutions brought against individuals. There were prosecutions brought against funds. There was a very well-publicized enforcement push against insider trading that involved new uses of investigative techniques, including the use of wiretaps.

The education and training that prosecutors got during the course of that enforcement push is now really ingrained in the U.S. Attorney's Office, and the emphasis on insider trading is not going away anytime soon. Now it's actually seen as being part of the bread and butter of the unit – part of the core mission for prosecutors in the unit and their partners at the SEC.

When you spend a lot of time in a particular enforcement area, like insider trading, you become really well versed in how the markets work, with a particular focus on alternative investments, like hedge funds and private equity funds, the experts who advise them, and the expert networking industry. As I said, that knowledge has become ingrained in the unit, and the focus on insider trading is here to stay.

The other big issue that has gained traction in the last eight years or so is the focus on accounting and disclosure. When I began my career as a prosecutor in 2004, one of the first matters that I worked on was the WorldCom case, the prosecution of Bernie Ebbers. The office was handling the fallout from the bursting of the tech bubble in 2000 and 2001. That cycle repeated itself, and every time there are large market

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shifts, you see a renewed focus on accounting and disclosure issues. Both the SEC and the U.S. Attorney's Offices have kept a close eye on these accounting and disclosure cases. It was certainly a focus for me when I was the chief of the unit. That area, which is one of the hardest to investigate and prosecute, has been and will continue to be a real enforcement focus for the Southern District of New York.

**What are the most important things for in-house counsel and directors to know about compliance and risk management in these areas?**

I can't emphasize enough that when regulators or prosecutors evaluate business conduct, either of individuals or of entities, they do so with the benefit of 20/20 hindsight. What can seem murky or unclear in the moment can take on sharp focus for regulators with the benefit of hindsight.

In-house counsel compliance and risk functions need to remember that their actions could potentially be evaluated by people who don't have their knowledge or expertise of their particular business – people who essentially get to armchair quarterback decisions that are made after the fact. So, what are the implications of that? It's really important to have up-to-date and state-of-the-art policies and controls. At the end of the day, you want to be able to show regulators that your firm was attentive to those issues from the outset, so that even if something has gone wrong, or a decision is being second-guessed, you are in a position of being able to fall back and say, in good faith, "We were doing our very best and making the best judgments that we could at the time."

There's often a tension between the business-generating aspects of a firm and the non-business generating aspects like compliance or legal. Prosecutors and regulators will take firms to task for perceived compliance weaknesses, including underfunding, understaffing, the subordinating of compliance functions, failures to follow internal policies or procedures. So it's important for compliance folks to remind the business-generating side of their singular importance in preventing these kinds of issues.

The other thing I want to say is that, although it sounds like a cliché, the tone that's set at the top of a business is actually incredibly important. If the tone at the top is equivocal, regulators using 20/20 hindsight can really come in and second-guess judgments that have been made. But if the tone at the top emphasizes compliance, that can also go a long way. Mistakes can be made, but when there's a perception that the people at the top aren't attentive, or don't care, or aren't placing the proper emphasis on certain issues, it can make every decision afterward seem much worse.

**How has COVID-19 impacted law enforcement activity? How have you been advising clients?**

COVID-19 has impacted every part of our lives, including areas of law enforcement. What we've seen over the last several months is that there's a renewed focus on, one, insider trading, and two, accounting and disclosure issues, making sure that there's a real focus on public entities making fair disclosures to the public about the impact of COVID on their businesses, both now and in the future. Then, three, there's a huge focus on frauds or scams that take advantage of COVID – investor frauds or cyber schemes that prey on people's COVID-related concerns.

Those are areas that you typically see prosecutors and regulators paying a great deal of attention to, but there's a new urgency and focus on these issues that is brought by a national, and in this case global, crisis. This is not surprising, but everyone needs to be aware that regulators are paying very careful attention to these issues.

As I've said to my clients, they need to be really attentive to, for example, issues around trading. If the client generates significant material nonpublic information that involves COVID, or if it has a relationship with the government, or if COVID is particularly impacting their business, they have to be incredibly focused on insider trading issues and disclosures.

It's also important to note that companies can be victims of COVID-related schemes. We're seeing that in the cyber area. There are those who are taking advantage of the fact that people are working from home, for example, or the fact that IT departments may not be centralized right now, and people are trying to take advantage of those vulnerabilities. So there are two hats that clients need to wear. One is being attentive to their own conduct, and two is protecting themselves from COVID-related schemes.

**Is there anything that we missed?**

One of the challenges of a market environment like this is that the facts on the ground are changing so quickly. This is one of the most fluid, dynamic times certainly in my lifetime. It creates added pressure on clients and companies to really stay up to date with all of the issues that we've been discussing, and it reinforces the need to have good, trusted folks that you can rely on to help you think through issues as the facts continue to change.

**Katherine Goldstein** is a partner with Akin Gump. She regularly advises companies, boards of directors and individuals facing high-stakes investigations by the DOJ, SEC and other regulators. Goldstein also counsels clients on sensitive internal investigations. Reach her at kgoldstein@akingump.com.