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Year In Review: Government Enforcement/Financial Litigation Developments

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This year we have seen a number of interesting and important developments in the world of government enforcement and financial/regulatory litigation. Here are our "Top 5:"

1. *Wal-Mart* permits the discovery of privileged internal investigation documents

As we discussed in August, the Wal-Mart decision out of the Delaware Supreme Court was significant because it made clear that the attorney-client and work product privileges are not impenetrable when it comes to internal investigations – at least not in Delaware. The Court, in formally adopting the *Garner* Doctrine, found that even when all parties agree that the privileges exist and apply, the privileges may be overcome and shareholders may be entitled to privileged documents if they can show "good cause." While the decision was important and has the potential to have far-reaching

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implications, the decision should not change their practices regarding the exercise and documentation of the attorney-client privilege and the work product doctrine in internal investigations.

2. Foreign exchange enforcement actions result in $4 billion in fines.

As we wrote about in August, the Commodity Futures Trading Commission has been focused on alleged manipulation of index benchmarks, including the benchmark for foreign exchange currencies – known as the London fix or the WM/Reuters Benchmark. In November 2014, the CFTC participated in a settlement with regulators in the United Kingdom and Switzerland over manipulation of the London fix, in which six large banks paid over $4 billion in fines. The settlement is significant in its size and the cooperation among international regulators. In the wake of these civil settlements, it is expected that criminal authorities will begin prosecuting individuals who were purportedly responsible for manipulating the benchmark, including those infamously reported as having participated in chat room discussions about making "free money" from the fix. In such prosecutions, which are expected to begin in 2015, we anticipate banks will cooperate with government authorities by producing allegedly inculpatory information against the individuals involved.

3. Stunning decision in the *Newman* and *Chiasson* cases deals a blow to the SDNY's crusade against insider trading

After following the *Newman* and *Chiasson* cases closely over the last year (see here and here), we recently covered the decision in the *Newman* and *Chiasson* cases, in which the Second Circuit not only reversed the insider-trading convictions of two former hedge fund managers, but threw out the case entirely. The Second Circuit found that Mr. Newman and Mr. Chiasson were remote tippees who were too far removed from corporate insiders to face liability for insider trading. While the ruling is not yet final and could go to the Supreme Court for review, it was a serious setback for the U.S. Attorneys' Office and its long-running battle against insider trading.

4. *Kaley* rejects effort to allow criminal defendants the ability to challenge asset seizures pre-trial

In March, we wrote about the *Kaley* case, in which the Supreme Court faced the issue of whether, in the context of asset seizures in connection with federal criminal charges, the Government should be required to establish probable cause to restrain assets in an adversarial evidentiary hearing. The Kaleys, who had been indicted on charges of transporting stolen medical devices and laundering the proceeds from the sale of those devices, faced a common dilemma for criminal defendants: "how can we adequately defend ourselves against wrongful charges if the Government has frozen the only assets that we have to retain counsel?" Nevertheless, the Supreme Court found that a post-deprivation hearing was not needed for the Government to maintain the possession of assets until the outcome of the trial, relying instead (wrongfully, in our opinion) on the safeguards afforded by the grand jury. The lesson to be learned from *Kaley* is that criminal defendants must challenge an asset seizure and the underlying criminal investigation before an indictment is returned.

5. Corporate FCPA settlements send 2014 out with a $1 billion bang

We saw a flurry of corporate FCPA settlements at the end of the year, including the Bio-Rad settlement in November and the four settlements announced in December. Thanks in large part to Alstom's record-breaking $772 million resolution, the Government collected almost $1 billion in FCPA-related disgorgement and penalties in November and December 2014 alone. Still, while the corporate enforcement trend continues, the DOJ and SEC largely failed to make good on their 2014 promises to bring more individual enforcement actions. It remains to be seen if the individual investigations that are reportedly in the pipeline will materialize into enforcement actions.