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OPINION

Don't give agencies criminal power

Consolidating criminal and civil authority is an extreme departure and is bound to create more problems.

BY DAVID Z. SEIDE AND BRIAN M. WHITE

Since the appointment of U.S. Securities and Exchange Commission Chair Mary Schapiro, and her selection of former federal prosecutor Robert Khuzami to head the Enforcement Division, SEC enforcement cases have picked up. But some believe that civil regulators should be vested with more power: authority to bring federal criminal cases. This controversial idea, floated in recent months by commissioners at the SEC and the Commodities Futures Trading Commission (CFTC), likely faces many hurdles.

On March 18, SEC Commissioner Luis Aguilar spoke to a meeting of lawyers where he made a number of proposals intended to streamline and intensify the SEC's enforcement process. Included was the suggestion that the SEC should have the power to bring criminal cases, as a "standby" or backup remedy, limited to cases "where the Department of Justice has declined to do so." Aguilar's position followed on the heels of a similar idea from CFTC Commissioner Bart Chilton. In a Feb. 10 speech he pointed to the complexity of Commodities Exchange Act (CEA) cases, the scarce resources of Department of Justice prosecutors and the difficulty of coordinating civil and criminal investigations among agencies as reasons to give the CFTC standby criminal authority, too.

How would this work? For example, one bill before Congress, the Derivatives Markets Transparency and Accountability Act of 2009, would allow the CFTC to bring CEA criminal cases "if the Attorney General has declined to do so." The bill would so empower the CFTC by exempting it from the prohibition found at 28 U.S.C. 516, which states: that, "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer

thereof is a party,…is reserved to officers of the Department of Justice."

It seems that the "standby" criminal authority proposal stems from the decline in criminal cases and other financial enforcement resources in recent years. There were only 66 federal criminal cases brought for securities and exchange fraud in 2008, down from 101 cases in 2005. And a recent U.S. Government Accountability Office report revealed that the number of SEC investigative attorneys fell by more than 10% from 2004 to 2008.

But giving civil agencies criminal power is not the answer. Putting aside the bureaucratic turf wars that would inevitably arise, consolidating criminal and civil authority is an extreme departure from established practice and is bound to create more problems. One line-blurring example is illustrated in a 1979 case from the U.S. Court of Appeals for the 5th Circuit, *Dresser Industries Inc. v. U.S.* In that case, Dresser, a public company, conducted an internal investigation into allegations that its employees made questionable foreign payments, and it turned the results of the investigation over to the SEC after the SEC agreed to keep the investigation confidential.

But the SEC then turned the results over to the Justice Department for criminal prosecution. Dresser claimed it could not be criminally prosecuted because the SEC had breached its confidentiality agreement with the company. The 5th Circuit disagreed because, "[s]ince the SEC…lacked actual authority to contractually limit the prosecutorial function of the Department of Justice, any agreement [between the SEC and] Dresser would be unenforceable." This would change with a grant of criminal powers to civil regulators, who would be able to make their immunity decisions based on their needs—which would include simply achieving civil enforcement objectives. In other words, they could use their added criminal power to further leverage subjects of civil investigation. Regulated financial entities dependent upon market participants' trust and confidence cannot survive criminal indictments.

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MANY QUESTIONS RAISED

And there are many additional questions. What kind of pretrial criminal procedure would the civil regulators apply (could or should they convene grand juries)? How will the regulators handle the differing proof issues between civil and criminal cases?

Some have therefore suggested that a grant of criminal authority increases the risks of abuse by concentrating too much power in a civil agency. Such power is likely to be a cause of judicial concern, as reflected in cases involving parallel proceedings. Although coordination between civil and criminal authorities is permissible, intertwined investigations may constitute government misconduct. The risks of improper government behavior would be heightened by collapsing the institutional barriers between civil and criminal agencies.

Given these issues, granting criminal authority to federal civil agencies faces formidable obstacles. But we are in the midst of the harshest financial crisis in generations, and the crisis is driving financial regulatory reform to the top of the public agenda. Given that reality, the debate over what a new and improved financial regulatory regime should look like has only just begun. And perhaps, by raising the issue, the commissioners may well achieve another goal: to get more attention and resources applied in this area.

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