FRAUDE BOURSIÈRE

XX God's Work and Conflicts of Interest

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Solution. - Une action pour fraude boursière, introduite par des plaignants à l'encontre de Goldman Sachs, reprochait à la banque d'avoir gonflé artificiellement le cours de ses actions à la suite d'une forte baisse due aux mesures coercitives des autorités pour absence de divulgation de conflits d'intérêt et fausses declarations trompeuses.
Impact. - Le présent commentaire étudie les impacts futurs de cette affaire sur les individus et les organisations ainsi que ses implications potentielles pour les responsables éthiques et compliance.

U.S. Supreme Court, June 21, 2021, Goldman Sachs et. al. v. Arkansas Teachers Retirement System et. al.

1. Background

In November 2009, the world was still recovering from the catastrophic impact of the Great Recession. In response to criticism of the firm's outsized bonuses, then CEO of Goldman Sachs (Goldman), Lloyd Blankfein, justified the bonuses in an interview with The Times of London by declaring: "We are doing God's work".

In 2011, a group of investors filed a securities-fraud class action lawsuit against Goldman and a group of executives, including Blankfein, for trading losses in Goldman's stock (purported to be $13 billion) resulting from making material misstatements and failure to disclose conflicts-of-interest related to certain collateralized debt obligations (CDO). This lawsuit was brought by several retirement funds following a settlement by Goldman with the Securities and Exchange Commission (SEC) for $550 million for misleading investors, as well as an investigation launched by the Department of Justice (DOJ), which resulted in a steep price decline. Specifically, the shareholders claimed that Goldman made generic representations in earlier SEC filings which inflated its stock price, including: "we have extensive procedures and controls that are designed to identify and address conflicts-of-interest"; "integrity and honesty are at the heart of our business"; "our reputation is one of our most important assets", and; "our clients' interests always come first".

While there are numerous complex legal technicalities embedded in this case, this article is focused on 2 critical issues: (1) the importance of this decision going forward, and; (2) the potential impact on the ethics and compliance profession.

2. The Importance of this Decision

On June 21, 2021, the U.S. Supreme Court (The Court) reviewed whether the certification of class, which was approved by the Second Circuit Court of Appeals, was complete. The Court held that the generic nature of misrepresentation is important evidence of price impact in determining whether and when to certify a class in a class action suit. In addition, the Court held that the defendant (Goldman) bears the burden of persuasion to prove a lack of price impact at the certification stage. As a result, the Court returned the lawsuit to the Second Circuit Court of Appeals to reconsider whether it had properly considered the generic nature of Goldman's misrepresentations based upon the trial court's determination of the record evidence on price impact - specifically, did these statements artificially inflate Goldman's stock[1].

The materiality of generic integrity statements by companies is now in the spotlight of legal proceedings. Whether Goldman's generic statements in fact caused the price of its stock to be artificially maintained is a $13 billion question that will be addressed by the Second Circuit Court of Appeals on remand from the Court[2]. Interestingly, when arguments were presented in March, both parties agreed that general misrepresentations asserting corporate integrity could be held actionable and give rise to fraud claims. Instead, the focus was narrowly limited to procedural rules regarding shareholder class actions. The more nuanced question remaining that divi-

1 See *V. Dindzans et al., SCOTUS Vacates Class Certification in Suit against Goldman Sachs and Clarifies Appropriate Scope of Price Impact: Goodwin Law, July 27, 2021.*

2 See *M. Scott Barnard et. al., SCOTUS Remands Securities Class Action Back to the 2nd Circuit: Akin Gump Strauss Hauer & Feld LLP, July 28, 2021.*

ded the Court is who bears the burden of proving or disproving "price impact" for class certification.

This decision will have a long lasting impact on: (1) generic statements being held as actionable; (2) the impact of such statements on stock price, and; (3) whether they constitute the basis for certifying a class of plaintiffs and, thereby, expanding the potential liability of a defendant in a fraud class action lawsuit.

3. The Potential Impact on the Ethics and Compliance Profession

Can organizations be legally held accountable for their words, stated beliefs, and values, or are they merely marketing slogans, which have no meaning? In an age when "purpose over profit", ESG (environmental, social and governance), and corporate social responsibility statements are proliferating, companies may now need to be extremely cautious in their public pronouncements.

Ethics and compliance executives are responsible for overseeing a growing range of risk domains. Their responsibilities begin with ensuring the company meets its obligations to laws, regulations, and company policies - the formal system. As the ethics and compliance profession has evolved, regulators and enforcement authorities are increasingly demanding companies to focus more on ethics, culture and integrity initiatives - the informal system - and less on adding layers of rules and procedures. Ethics and compliance executives play a prominent role in shaping the culture at their respective organizations. Culture is a system of values based upon the underlying assumptions, beliefs, attitudes and expectations shared by an organization.

MIT Professor Emeritus Edgar Shein, considered by many as the leading thinker on corporate culture, believes culture is captured through: (1) a company's artifacts, i.e. language, rites and ceremonies, legendary stories, as well as myths and legends; (2) the formal and publicly stated values espoused by the company, and; (3) how things really get done, i.e. are a company's words and actions consistent and in alignment.

The questions confronting ethics and compliance executives from the Goldman case are: (1) do words matter? and; (2) if so, how will it impact organizations going forward? Regarding the former question, in this case both plaintiffs and the defendant (and the Court) agree that misrepresentations are actionable and can be the basis of fraud claims. The latter question, however, focused on who is responsible for proving price impact on class certification. The answer to the latter question will determine the extent of liability in such fraud cases.

Joe Murphy, a pioneering global leader in the ethics and compliance profession, worries that if companies can be sued for their compliance and ethics words, it won't be long before in-house lawyers are telling us "Don't say anything about ethics and compliance in writing", concerned that that these statements are mere bait for plaintiff lawyers. What companies will be willing to make such pronouncements in their annual reports, recruiting material, training programs, or marketing brochures? Who will be willing to make presentations at conferences about their company's code of ethics, or in keynote speeches by top executives? It seems likely we may see more statements that are merely "aspirational", rather than standards, ideals, or goals for the firm to achieve. The extent to which companies dilute its statements of values, how will it impact corporate culture, or a company's brand?

4. Conclusion

Clearly, the outcome of this case will have a significant impact for years to come on companies, as well as on ethics and compliance executives in managing fraud risks. I have long said that words without actions are an empty chalice. The outcome of this case opens the possibility of significant personal and corporate liabilities. Ultimately, the answer will determine which companies are really doing "God's work".