



Goldman To Keep Up The Fight, For Now

By Evan Weinberger

Law360, New York (May 04, 2010) -- As more fronts open in the war over [Goldman Sachs](#) Group Inc.'s alleged fraudulent activity and rumors swirl that the beleaguered bank is intending to settle with the U.S. Securities and Exchange Commission, the outward strategy remains the same: fight, fight, fight.

From the moment the SEC's civil case was filed, Goldman Sachs has been ready to do battle with the regulator over the alleged disclosure violations. But while members of the defense bar say Goldman has a good chance of prevailing, that's only if the case sticks to the facts, public sentiment is checked at the door and the U.S. Department of Justice does not follow through on criminal charges.

“The strategy is going to be very fact-specific here as to what Goldman said and didn't say with respect to the people on the long side of the transactions,” said Alan R. Kaufman, a partner at [Kelley Drye & Warren LLP](#) and a former federal prosecutor.

The SEC complaint, filed April 16 in the U.S. District Court for the Southern District of New York, accuses the investment bank of playing both sides in creating a collateralized debt obligation made up of mortgage-backed securities that was designed to fail, reportedly costing investors well over \$1 billion.

Goldman allegedly did not reveal to either investors or the company responsible for selecting the subprime mortgages for the synthetic CDO that hedge fund Paulson & Co. had taken out credit default swaps against the CDO, betting that the value of the mortgages would plummet.

The Abacus CDO at the center of the SEC's case saw Goldman serve as the market-maker among sophisticated financial players, Kaufman said.

By definition, all parties to the transaction should have known that there was someone taking the opposite bet on the other side, and that will be the point Goldman tries to drive home at trial, he said.

But that strategy may prove difficult to pursue if the SEC tries to capitalize at all on the current public sentiment, attorneys say.

Goldman Sachs, which has come out of the financial crisis stronger, handing out massive bonuses to executives, has borne the brunt of much public anger as the economy slowly climbs out of recession. One magazine called the bank — which is facing a subpoena in the Galleon Group insider trading case, scrutiny over its role in advising the Greek government

prior to the country's financial collapse and numerous other court cases — a “vampire squid,” benefiting as the economy failed.

Marvin Pickholz, a partner at [Duane Morris](#) LLP and a former high-ranking SEC enforcement official, compared the atmosphere, including recent circus-like Senate hearings, to watching “Madame Defarge with her knitting needles.”

In that atmosphere, according to Sara Shanahan, a partner at [Sherin & Lodgen](#) LLP, Goldman's attorneys are going to have to keep the trial focused entirely on the specific claims at issue and not allow the SEC to bring in any populist outrage, if the case gets that far.

“I think they'll work very hard to focus both the legal arguments before trial, and if they get there at trial, to the facts of the deal in question,” she said.

But while the specifics may help Goldman against the SEC, the game could change entirely should the U.S. Department of Justice — which is conducting an investigation into Goldman — decide to bring the hammer of criminal charges down on the Wall Street titan.

“The more risks that you face, the more likely you are to make a deal,” said Curtis Alva, a partner at [Gunster Yoakley](#) & Stewart PA.

Pravin Rao, a former federal prosecutor and SEC Enforcement Division branch chief who is now a partner at [Perkins Coie](#) LLP, said that if the Justice Department brings criminal charges, much of Goldman's defense strategy could be significantly altered.

For one thing, depositions become more problematic.

“Everyone gets a little concerned about testifying or providing a deposition because they get worried that what they say could be used against them in the criminal investigation,” Rao said.

Invoking Fifth Amendment rights and refusing to provide information in the criminal proceedings could be used against Goldman in civil proceedings by the SEC or by private litigants asking the judge for an adverse inference ruling.

On top of that, not testifying could allow incriminating e-mails and other documents to be presented as evidence without Goldman being able to provide context, Rao said.

“It's adding gasoline to the fire,” he said.

Alva said a criminal case also gets rid of one of Goldman's best defenses against the SEC: spending it into oblivion.

"The Department of Justice has a much larger budget to do battle with Goldman," he said.

The SEC's case is not the only litigation Goldman is facing linked to the Abacus deal. The bank said in a Monday SEC filing that five separate shareholder derivative actions have been filed, and an existing shareholder suit in the Delaware Court of Chancery has added the Abacus deal to its claims.

Alva said Goldman is most likely not adding concerns about the private litigation to its defense strategy.

"I can't imagine that they're particularly concerned about the plaintiffs' firms and the plaintiffs' lawsuits that have been brought," he said.

And in reality, those claims are different, Shanahan said. Most of them deal with allegations that Goldman failed to disclose the SEC investigation when it received a Wells notice and that investors lost boatloads when the civil suit came about.

"It's really going to be a different analysis," she said.

Given the stakes and the amount of scrutiny the bank is facing, Goldman may have no choice but to defend itself, and defend itself strongly, Pickholz said.

"You either have to say, 'I'm ready to be everybody's victim,' or 'I'm not going to be anybody's victim, and I'm going to slug it out for the next five years,'" Pickholz said.