Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Crowell's Tom Hanusik

Law360, New York (April 12, 2013, 12:57 PM ET) -- Tom Hanusik is a partner in Crowell & Moring LLP's Washington, D.C., office and chairman of the firm's white collar and regulatory enforcement group. He joined the firm in 2007 after serving as an assistant chief in the Criminal Division's Fraud Section at the U.S. Department of Justice and in the U.S. Securities and Exchange Commission's Division of Enforcement. At the DOJ, he was one of the original prosecutors on the Enron Task Force, and he led the DOJ prosecution team investigating the international abuse of finite reinsurance products. Hanusik's recent engagements include matters involving alleged Foreign Corrupt Practices Act violations, investment adviser fraud, disclosure violations, insider trading, tax offenses, public corruption, and export control infractions.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Enron. The combination of incredibly complicated, novel financial transactions, intense media and political pressure, and facing off against literally dozens of the best defense lawyers in the country, left virtually no margin for error. I was very fortunate to flip a key, high-level Enron executive early in the process and secure a number of important cooperators and convictions as a result, without which we would have accomplished virtually nothing. But it was extremely challenging to be under a continuous microscope with all sorts of pressure to deliver results as quickly as possible.

Q: What aspects of your practice area are in need of reform and why?

A: The Foreign Corrupt Practices Act needs to be clarified to say clearly and unequivocally what is permissible in terms of facilitating payments and what is not. The distinction between legally paying a nominal sum to get a customs official to stamp your visa or clear your product, when they are already obligated to do that, and violating the FCPA by paying the same nominal sum to a customs official to exercise any form of discretion, which they do just by acknowledging your presence, is not at all helpful to a business that is trying in earnest to comply with the law. U.S. companies are at an extreme disadvantage in certain parts of the world where such payments are customary, if not required.

If our government wants to take the position that all such payments are illegal, it should eliminate the facilitating payment exception while recognizing that it is ceding an enormous competitive advantage to non-U.S. companies that are not subject to the FCPA. If, on the other hand, the use of facilitating payments is permissible, then both DOJ and SEC need to better articulate what is allowed and what is not. The recent guidance from both agencies was a step in the right direction, but it did not go far enough.

Q: What is an important issue or case relevant to your practice area and why?

A: The U.S. Supreme Court's Janus decision is having a big impact on the SEC's (and private plaintiffs) ability to charge primary violations of the anti-fraud provisions, and it has the potential to have a more widespread impact on other statutes and regulations to the extent that it portends a strict, literal reading of statutory language in the Exchange Act that could severely limit the SEC's ability to pursue certain cases against both individual executives and parent companies. The court's focus on who "made" a statement and its conclusion that a maker is responsible for not only the content but also the dissemination of a statement has already created a number of inconsistent interpretations at the district court level, with more to come.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Pete Romatowski of Jones Day is one of the best practitioners in the white collar bar. He is smart, affable and a straight shooter. When an executive at one of my clients needed his own lawyer and asked: "Who would you hire if you needed a lawyer?" I did not hesitate to recommend Pete because he knows the law, has tremendous credibility with the prosecutors and regulators, sees it and tells it like it is, and is a great person to have on your side.

Q: What is a mistake you made early in your career and what did you learn from it?

A: When I was a first-year associate (at another firm), I argued a default judgment motion in front of then New York Supreme Court Judge Harold Baer (now on the federal bench in Southern District of New York). Our firm had a lot of these cases, and they were pretty routine and involved suing investors to recoup money invested in tax shelters utilizing promissory notes. When the tax laws changed, people stopped paying the notes and our client sued to recover the money it had lent them.

For this particular motion, there were a number of exhibits and I fumbled through them looking for the affidavit of service, all the while testing Judge Baer's patience until he had no more and denied the motion because I took too long to find the affidavit. Needless to say, the walk back to the office, tail between my legs, to tell the partner I lost a motion for a default judgment was slow and painful. We ultimately won a motion to reconsider, which I attended but did not argue, but I learned a really important lesson: Always be prepared, especially in court.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.