GIBSON DUNN

A Glimpse Behind the Curtain: Insights to SEC Enforcement During the Pandemic and Tips for Mitigating Investigative Risk

Client Alert | May 13, 2020

In a speech on May 12, 2020, Steven Peikin, Co-Director of the U.S. Securities and Exchange Commission's Division of Enforcement, provided insights on the Division's enforcement priorities in light of the pandemic, as well as how the Division is managing the investigative process under remote work conditions.[1] The remarks provide helpful guidance on how companies and financial institutions can mitigate risk of investigative scrutiny for financial shocks resulting from the pandemic.

In response to the pandemic, the Enforcement Division has formed a Coronavirus Steering Committee, comprised of leadership from the Home and Regional Offices, the specialized units and the Office of Market Intelligence, to identify areas of potential misconduct and coordinate the Division's response to COVID-19 related issues. The below areas of regulatory focus provide a helpful roadmap for companies and financial institutions, and reinforce the guidance we provided in our prior alert, to reduce the risk of drawing scrutiny.

- *Insider Trading and Market Manipulation*: The rapid and dramatic impact of the pandemic on the financial performance of companies increases the potential for trading that could be perceived as attributable to material non-public information. The Steering Committee is working with the Division's Market Abuse Unit to monitor announcements in industries particularly impacted by COVID-19 and to identify potentially suspicious market movements.
- *Accounting Fraud*: As with other financial crises, the pandemic is likely to expose previously undisclosed financial reporting issues, as well as give rise to rapidly evolving financial reporting and disclosure challenges. The Steering Committee is on the lookout for indications of potential disclosure and reporting misconduct. In particular, the Steering Committee is reviewing public filings with an eye toward disclosures that appear out of step to companies in similar industries. The Committee is also looking for accounting that attempts to inaccurately characterize preexisting financial statement issues as coronavirus related.
- *Asset Management*: Asset managers confront unique challenges created by the pandemic, including with respect to valuations, liquidity, disclosures, and the management of potential conflicts among clients and between clients and the manager. The Steering Committee is working with the Division's Asset Management Unit to monitor these issues, including failures to honor redemption requests, which could reveal other underlying asset management issues.
- *Complex Financial Instruments*: As with prior financial crises, the pandemic may reveal risks inherent in various structured investment products. The Steering Committee is working with the Division's Complex Financial Instruments Unit to monitor complex structured products and the marketing of those products to investors.
- *Microcap Fraud*: The Steering Committee is working with the Division's Microcap

Related People

Mark K. Schonfeld

Tina Samanta

Fraud Task Force and Office of Market Intelligence, and has suspended trading in the securities of over 30 issuers relating to allegedly false or misleading claims related to the coronavirus.

As we discussed in our prior alert, by understanding the issues that can give rise to regulatory scrutiny, and consulting with counsel on how to navigate the unique challenges, issuers and financial institutions can both lower the risk of being in a regulatory spotlight, as well as resolve regulatory inquiries more efficiently.

Speaking more broadly on the Enforcement Division's process during the pandemic, Peikin noted that the Division staff continues to remain engaged despite the new challenges of a remote work environment. The Division staff has been directed to work with defense counsel and others to reach reasonable accommodations concerning document production, testimony, interviews and counsel meetings, given the challenges of the pandemic, but also cautioned that the staff will need to protect potential claims and won't agree to an indefinite hiatus in investigations or litigations. In particular, Peikin noted that in instances where defense counsel would not agree to tolling agreements, the Division will consider recommending that the Commission commence an enforcement action, despite an incomplete investigative record, and will rely on civil discovery to further support its claims.

Predictably, the pandemic has already led to a marked increase in Enforcement investigations and whistleblower tips. Since mid-March, the Division has opened hundreds of new investigations concerning issues related both to COVID-19 as well as traditional areas of investigation. In addition, the Division has triaged more than 4,000 whistleblower tips since mid-March, a 35% increase over the same period last year. Since March 23, the Commission has granted nine whistleblower awards, including one for over $27 million (though these awards were clearly in the pipeline long before the pandemic). Nevertheless, the notable increase in whistleblower complaints further reinforces the guidance in our prior alert on how companies can manage the heightened risks of whistleblowers resulting from the pandemic.

In sum, Peikin noted that while there is uncertainty ahead, the Enforcement Division expects the pandemic will result in increased enforcement activity as the market decline and volatility will lead to investigations of potential past misconduct as well as potential new misconduct.

---

[1]   *See* May 12, 2020 Keynote Address: Securities Forum West 2020, available at https://www.sec.gov/news/speech/keynote-securities-enforcement-forum-west-2020.

Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team, the Gibson Dunn lawyer with whom you usually work in the firm's Securities Enforcement Practice Group, or the following authors:

Mark K. Schonfeld – New York (+1 212-351-2433, mschonfeld@gibsondunn.com)
Tina Samanta – New York (+1 212-351-2469, tsamanta@gibsondunn.com)

GIBSON DUNN

Related Capabilities

[Securities Enforcement]

[Litigation]