"SEC Enforcement: Priorities and Trends"

Wednesday, November 15, 2023

Course Materials

“SEC Enforcement: Priorities and Trends”

Wednesday, November 15, 2023

2 to 3 p.m. Eastern [archive and transcript to follow]

The SEC’s Division of Enforcement recently completed another active year, with several high-profile investigations, enforcement actions and settlements, and the agency’s enforcement efforts show no sign of letting up in 2024. Corporate boards and management and their legal advisors need to stay up to date on the SEC’s enforcement priorities and trends in the agency’s enforcement efforts in order to ensure that they stay out of its crosshairs. Join our panel of experts as they share lessons learned from recent enforcement activities and insights into what the new year might hold.

Joining us are:

- **Scott Kimpel**, Partner, Hunton Andrews Kurth LLP
- **Allison O’Neil**, Partner, Locke Lord LLP
- **Kurt Wolfe**, Of Counsel, Quinn Emanuel Urquhart & Sullivan, LLP

Among other topics, the program will cover:

- SEC Enforcement Activities in 2023 and Priorities for 2024
- Monetary and Non-Monetary Penalties
- Accounting and Disclosure Actions
- Actions Targeting Gatekeepers
- Whistleblower Developments and Trends
- Self-Reporting and Cooperation Credit
- Coordination with DOJ Investigations

“SEC Enforcement: Priorities and Trends”

Course Outline/Notes

1. SEC Enforcement Activities in 2023 and Priorities for 2024

2. Monetary and Non-Monetary Penalties

3. Accounting and Disclosure Actions

4. Actions Targeting Gatekeepers

5. Whistleblower Developments and Trends

6. Self-reporting and Cooperation Credit

7. Coordination with DOJ Investigations

“SEC Enforcement: Priorities and Trends”

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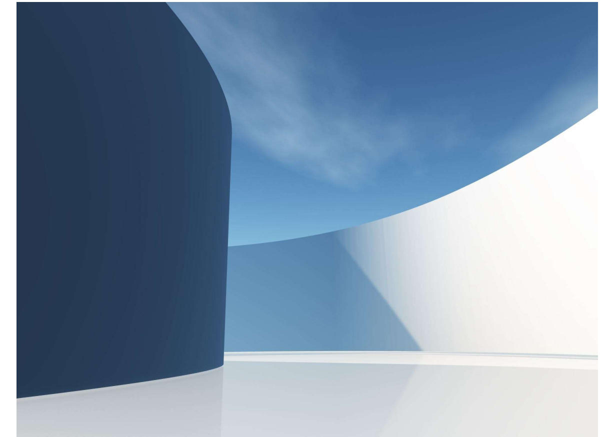
SEC Enforcement: Priorities and Trends



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SEC Enforcement Activities in 2023 and Priorities for 2024

- In fiscal year 2023, The SEC **filed 784 enforcement actions**, a 3 percent increase over fiscal year 2022, including 501 original, or "stand-alone," enforcement actions, an 8 percent increase over the prior fiscal year.
- The SEC obtained orders for $4.949 billion in financial remedies, including **$3.369 billion in disgorgement and prejudgment interest** and **$1.580 billion in civil penalties**. Both the disgorgement and civil penalties ordered were the second highest amounts on record.
- The SEC obtained **orders barring 133 individuals** from serving as officers and directors of public companies, the highest number of officer and director bars obtained in a decade.
- The SEC distributed **$930 million to harmed investors** in fiscal year 2023, marking the second consecutive year with more than $900 million in distributions.

Monetary and non-monetary penalties

- **SEC has authority to obtain civil monetary penalties, disgorgement, D&O bars, and other sanctions.**
- **Penalties within a range in recent years but trending up.**
- **Results driven by sweeps, internal pressure to maintain performance.**

	2023	2022	2021	2020	2019	2018	2017	2016
TOTAL	$4,949	$6,439	$3,852	$4,680	$4,349	$3,945	$3,789	$4,083
Penalties	$1,580	$4,194	$1,456	$1,091	$1,101	$1,439	$832	$1,273
Disgorge	$3,369	$2,245	$2,396	$3,589	$3,248	$2,506	$2,957	$2,809
Returned to Investors	$930	$937	$521	$602	$1,197	$794	$1,073	$140

Accounting and Disclosure Actions

Examples of recent cases:

1. Insider Trading
2. Financial Reporting
3. ESG
4. Section 13-16 Sweep
5. Cybersecurity

4

Actions Targeting Gatekeepers

When does SEC pursue a gatekeeper?

- Participate in misconduct
- Mislead regulator
- Wholesale failure to carry out compliance responsibilities

5

Whistleblower Developments and Trends

- Fiscal year 2023 was a record-breaking year for the SEC's Whistleblower Program.
- The SEC issued whistleblower awards totaling nearly $600 million, the most ever awarded in one year, including a record-breaking $279 million awarded to one whistleblower.
- The Commission received more than 18,000 whistleblower tips in fiscal year 2023, a record number and approximately 50 percent more than the then-record 12,300 whistleblower tips received in fiscal year 2022.
- The SEC received more than 40,000 tips, complaints, and referrals in total, a 13 percent increase over fiscal year 2022.

6

Self-Reporting and Cooperation Credit

- The Enforcement Division's Cooperation Program provides incentives to individuals and companies who come forward and provide valuable information to SEC investigators.
- The staff will consider several broad measures of a company's cooperation:
  - **Self-policing**;
  - **Self-reporting**;
  - **Remediation**; and
  - **Cooperation.**
- "**In fiscal year 2023, the SEC consistently rewarded meaningful cooperation** to efficiently promote compliance across the securities industry."

"Process is about meaningful cooperation. . . It means going above and beyond to self-report, cooperate, and remediate. Across numerous actions last fiscal year, the Commission ordered zero or reduced penalties based on the respondents' cooperation."

~Gary Gensler

Coordination with DOJ Investigations

- Cross Agency coordination continued in 2023
- In 2023, continued to coordinate on insider trading cases against high level executives. With these cases, we saw both DOJ and SEC using data analytics and technology to identify unusual trading patterns, including the "friends and family" insider trading.

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SEC Announces Settled Enforcement Actions Against Company Insiders and 5% Holders

October 16, 2023

On September 27, 2023, the Securities and Exchange Commission (the "SEC") announced settled enforcement actions against six officers, directors and major shareholders of various public companies for allegedly failing to timely report information about their holdings and transactions in company stock, and simultaneously announced settled actions against five public companies for allegedly causing these insiders' filing failures or for failing to report their insiders' filing delinquencies. The actions are part of a recent SEC enforcement initiative aimed at ensuring compliance with ownership disclosure rules by company insiders.

Under Section 16(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 16a-3 promulgated thereunder, officers and directors of public companies, and any beneficial owners of greater than 10% of stock in a public company, must file initial statements of holdings on Form 3 either (1) within 10 days of becoming an insider or (2) on or before the effective date of the registration of the stock. Such insiders are then obligated to keep this information current by reporting subsequent transactions on Forms 4 and 5. In turn, Section 13(a) of the Exchange Act and Item 405

of Regulation S-K promulgated thereunder require issuers to disclose information regarding delinquent Section 16(a) filings by insiders in their annual reports.

Similarly, under Section 13(d)(1) of the Exchange Act and Rule 13d-2(a) thereunder, any person who has acquired beneficial ownership of more than 5% of a public company's stock must, within 10 days of the acquisition, file an initial disclosure statement on Schedule 13D with the SEC, which must include, among other things, the identity of the beneficial owner, the amount of beneficial ownership and the owner's intentions for the issuer. The owner must then update the SEC on any material changes to its position. Certain investors are eligible to file a simplified statement on Schedule 13G. The deadline to file a Schedule 13G is also within 10 days of acquiring more than 5% beneficial ownership, but certain institutional investors may be permitted to defer disclosing their passive holdings on Schedule 13G until 45 days after the end of the calendar year.

Here, the SEC alleged that six persons, who were either officers or directors of a public company or owned at least 5% of the stock in a public company, repeatedly failed to timely file or update reports required under Sections 16(a) and/or Section 13(d)(1) to reflect transactions in their company's stock, in violation of those provisions—allegedly resulting in late filings ranging from weeks to years. The SEC explained that its enforcement staff used data analytics to identify the insiders it ultimately identified as allegedly having repeatedly filed late reports. The SEC also alleged that five public companies had either failed to ensure that their insiders were making timely disclosures under Section 16(a) or failed to report such delinquent reports in their annual filings, as required under Section 13(a).

The insiders and companies charged agreed to pay civil penalties totaling $1.5 million to settle the actions. The individual penalties ranged from $66,000 to $150,000 and the corporate penalties ranged from $125,000 to $200,000. Public companies and their insiders should be aware that the SEC plans to continue its emphasis on enforcing insider disclosure rules, and that the SEC is increasing its use of data analytics, which will make it even easier to identify late filings to conduct investigations.

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BLOGS

SEC Turns Workplace Misconduct into Disclosure Controls Violation; Clarifies Protection for Whistleblowers

By Rob Evans, Stanley Keller and Eugene W. McDermott Jr.

Capital Markets Blog

February 7, 2023

The SEC announced on February 3, 2023 a settled enforcement action against Activision Blizzard, Inc., finding that it failed to have adequate controls for reporting widespread workplace misconduct to management and used separation agreements for employees that impeded whistleblowing in violation of SEC rules.[1]

Disclosure Controls and Procedures Failures

The SEC's order says that between 2018 and 2021 Activision Blizzard lacked controls and procedures among its separate business units to collect and analyze employee complaints of workplace misconduct. Activision faced a number of employee complaints and in 2022 agreed to an $18 million consent decree with the Equal Employment Opportunity Commission (EEOC) related to alleged sexual harassment, pregnancy discrimination, and retaliation. Because of Activision Blizzard's lack of controls and procedures, management of the company was not able to properly understand the extent of workplace misconduct and so did not assess whether public disclosure of those issues was required. This was the case even though Activision Blizzard identified the importance of attracting and retaining qualified personnel as a risk factor.

This is not the first time that the SEC has responded to a company's experiencing operational problems that were not timely disclosed by characterizing he circumstances as a failure to maintain adequate disclosure controls and procedures.[2]

Protecting Whistleblowers

The SEC found that Activision Blizzard had, from 2016 through 2021, used separation agreements with former employees that required them to notify the company if they received a request from a government administrative agency in connection with a report or complaint. SEC Rule 21F-17, which became effective in 2011, provides in relevant part:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.

The SEC, since bringing its first enforcement action under Rule 21F-17 in 2015, has brought a series of other actions focused on removing provisions of confidentiality agreements, separation agreements and internal policies that attempt to limit an employee or former employee's communication with the SEC as a whistleblower.

The Activision Blizzard separation agreements did not stop former employees from communicating with the SEC, but did require them to alert the company if the SEC asked them for more information or otherwise made a request of them in connection with a report or complaint, thereby requiring the former employees to let the company know about their communication with the SEC.

The SEC's press release included the following quote: "[T]aking action to impede former employees from communicating directly with the Commission staff about a possible securities law violation is not only bad corporate governance, it is illegal." In its enforcement action against BlueLinx Holdings Inc., the SEC similarly found that BlueLinx's separation agreements, which required notice to the company before giving information to the SEC, forced employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits.

Takeaways

- The SEC action against Activision Blizzard demonstrates the risk that operational problems can be converted with hindsight into a deficiency of disclosure controls and procedures. This may be particularly true for operational problems involving management. Note also that the Delaware Court of Chancery held in a case involving widespread workplace sexual harassment that officers, similar to directors, have a fiduciary duty of oversight and can be liable for a breach of fiduciary duty as a result of the officer's own sexual misconduct, see *In re McDonald's Corp. Stockholder Derivative Litig.* (Del. Ch. Jan. 26, 2023); the SEC announced a settled enforcement action against the same company and officer for failing to adequately disclose the circumstances of the officer's termination, see Release No. 34-96610 (Jan. 9, 2023).
- Companies should consider evaluating their policies and procedures for reporting up operational problems and should reflect those as part of their disclosure controls and procedures.
- Although not raised by the SEC, companies should be alert to whether operational problems create potential contingent liabilities that might need to be reflected in the company's financial statements.
- The SEC's action is a reminder of the need to revisit policies and agreements with current and separating employees to ensure that they do not run afoul of the SEC's whistleblower rules by discouraging reporting by employees to the SEC or other regulatory agencies such as the EEOC or the National Labor Relations Board, which each have similar rules.

If you have any questions about these changes, your regular Locke Lord contact or any of the authors can discuss these matters with you.

[1] SEC Commissioner Peirce dissented, explaining in her Statement that, in her view, (i) the Order does not identify any securities law violations, but rather "[u]sing disclosure controls and procedures as its tool, [the SEC] seeks to nudge companies to manage themselves according to the metrics the SEC finds interesting at the moment", and (ii) the separation agreement does not impede communication with the SEC.

[2] See e.g., First American Financial Corporation, Release No. 34-92176 (June 14, 2021) (cybersecurity disclosure controls failure).

The post SEC Turns Workplace Misconduct into Disclosure Controls Violation; Clarifies Protection for Whistleblowers appeared first on Capital Markets.

AUTHORS

SEC and DOJ Signal Aggressive Stance to Corporate America

Less than 10 months since inauguration day, the Biden Administration's civil and criminal enforcement arms are signaling a more aggressive stance, looking squarely at corporate America. Recent speeches from senior officials at the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") show that both entities plan to take a hard-line approach toward corporate wrongdoing, with a similar set of priorities. To navigate these waters, corporations should think carefully about how to proactively bolster their compliance and corporate governance programs to mitigate the risk of DOJ and SEC inquiries. But in the event of an investigation, corporations and their counsel need to consider whether the "juice is worth the squeeze" when it comes to the traditional approach of self-reporting and cooperation, since the risks of cooperation and the consequences of wrongdoing appear to be rising.

The DOJ was the first mover. On October 28, 2021, during an address to the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco announced three changes to the department's policies on corporate criminal enforcement.

1. **Cooperation Credit – A Return to the Yates Memo:** To be eligible for cooperation credit, companies must identify *all* individuals involved in or responsible for alleged misconduct and provide *all* non-privileged information about their involvement. This approach rescinds some Trump-era tweaks to Department policy, which softened the requirements outlined in the Yates Memo and vested corporations with the discretion to determine who was "substantially" involved and to limit disclosures accordingly. No more: to get cooperation credit, corporations must provide sweeping disclosure to the DOJ, increasing the potential scope of any DOJ action and the costs of cooperation.

2. **DOJ Decisions – All Conduct Counts:** In deciding how to charge and resolve corporate wrong-doing, the DOJ will now review a company's entire criminal, civil, and regulatory record, including past missteps that are not similar to the conduct at issue. So, for example, if a company embroiled in an FCPA investigation was previously sanctioned for its revenue recognition practices, then that unrelated earlier misconduct will be taken into account by the DOJ. Previously, prosecutors were directed by the Justice Manual to consider a "corporation's history of *similar* misconduct" when making decisions. No more: DAG Monaco made clear that, going forward, "all prior misconduct needs to be evaluated . . . , whether or not that misconduct is similar to the conduct at issue in a particular investigation," and "prosecutors need to start by assuming all prior misconduct is potentially relevant." Along these same lines, DAG Monaco explained that the DOJ is examining whether deferred- or non-prosecution agreements will even be offered for repeat offender companies. All of this increases the potential for harsher corporate charges and resolutions.

3. **Corporate Resolutions – Monitors When Appropriate:** DAG Monaco also made clear that the DOJ will impose a corporate monitorship "whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and

disclosure obligations," and that such sanctions are no longer to be viewed as disfavored or exceptional. The prospect of increased imposition of monitorships – an expensive and burdensome proposition for most corporations – further signals the department's desire to add teeth to pre-trial resolutions.

Big picture, these changes reflect a stronger stance on corporate wrongdoing by the DOJ, underscoring the importance of companies putting in place robust front-end compliance programs, but also introducing new costs into the cost-benefit analysis of self-reporting and cooperating with the DOJ, in light of the heightened consequences of a DOJ conclusion of corporate wrong-doing.

The SEC followed quickly in the DOJ's wake. On November 4, 2021, in his prepared remarks at the Securities Enforcement Forum, Chair Gary Gensler announced that the SEC would take a similarly strong approach to policing capital markets and corporate wrongdoing. Chair Gensler opened his remarks with a 1934 quote from Joseph Kennedy, the first Chairman of the Commission: "The Commission will make war without quarter on any who sell securities by fraud or misrepresentation." That quote set the tone, as Chair Gensler explained that the Commission will enforce its mandate by holding individuals and corporations accountable for their financial misdeeds, promoting deterrence and respect for the law through both prosecuting routine matters and "high-impact" cases designed to grab headlines. Chair Gensler expressly cited DAG Monaco's speech, summarizing her revisions to the DOJ's approach to corporate crime, and making clear that the SEC shares her views: "While [the SEC and DOJ] are independent, and our enforcement tools, authorities, and missions are distinct, these changes [announced by the DOJ] are broadly consistent with my view of how to handle corporate offenders." Significantly, Chair Gensler observed that "cooperation" with the SEC means more than "meeting . . . legal requirements, such as responding to lawful subpoenas or making witnesses available for lawfully-compelled testimony," or "conducting a self-serving, independent investigation." Rather, it is likely that the Commission will follow the DOJ's articulated approach of requiring full self-reporting of the individuals and information relevant to the misconduct. In addition, with regard to remedies, the Commission is likely to view repeat offenders, even those with distant or unrelated misconduct, harshly.

In the wake of these pronouncements, corporations have much to consider. ***First***, corporations – particularly those in highly-regulated industries like finance and healthcare – should promptly take stock of their affairs and consult with counsel to determine if updates to reporting and compliance programs are in order, across their organization. Getting *ahead* of regulatory concerns with robust systems and a culture of compliance is critically important, not only to better the odds of avoiding regulatory concerns in the first place, but also to mitigate the severity of resolutions if and when issues come to light. ***Second***, corporations and their counsel should conduct a holistic assessment of their regulatory compliance record – that way, if and when the SEC or DOJ come knocking, the corporation will be ready to address questions about those past issues, potentially diffusing the government's concerns at the outset. ***Third***, corporations and their counsel would do well to get ahead of possible SEC or DOJ inquiries by doing strategic thinking *now* about the costs and benefits of cooperation in this new world – keeping in mind the reality that cooperation, more than ever, is an "all in" affair.

***

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to us.

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DOJ Announcements on Corporate Compliance Programs, Compensation Clawbacks and National Security

March 17, 2023

What Happened

The US Department of Justice ("DOJ") made several recent announcements expanding on its expectations for corporate compliance programs and unveiling new guidance on executive compensation structures, consequence management and business communications and ephemeral messaging.

DOJ also announced a new enforcement push focused on the intersection of corporate crime and national security.

Analysis

Updated Guidance on the Evaluation of Corporate Compliance Programs

DOJ Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite recently announced a number of significant policy changes affecting corporate criminal enforcement by DOJ during presentations at the ABA's Institute on White Collar Crime in early March. These announcements expand on Monaco's September 15, 2022 Memo on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, which laid the foundation for more detailed guidance on corporate compliance programs.

Among the more notable changes are:

1. the rollout of a three-year Pilot Program Regarding Compensation Incentives and Clawbacks (the "Pilot Program"), which will require corporations who enter into criminal resolutions with DOJ's Criminal Division to include "compensation-related criteria" in their corporate compliance programs and offer fine reductions to companies that seek to clawback compensation from culpable individuals in appropriate cases;

2. guidance to prosecutors to assess a company's "consequence management" procedures to identify, investigate, discipline and remediate violations of law, regulation or policy; and

3. guidance on how DOJ will consider a company's compliance program, policies and procedures relating to employees' use of personal devices, communications platforms and ephemeral messaging applications.

Companies and regulated entities will need to reevaluate existing compliance programs to ensure their compliance programs are accounting for this new guidance.

Executive Compensation and Clawbacks

In his speech on March 3, Polite announced two key changes to DOJ policies pertaining to the evaluation of corporate compensation systems for all companies. Effective immediately, prosecutors assessing a corporation's compliance program under DOJ's updated guidance document, Evaluation of Corporate Compliance Programs (the "ECCP"), are directed to consider the design and implementation of a company's compensation schemes to determine whether compensation is configured to incentivize compliance. The revised ECCP provides that prosecutors may consider, for example, "whether a company has incentivized compliance by designing compensation systems that defer or escrow certain compensation tied to conduct consistent with company values and policies" and whether a company maintains and enforces "provisions for recoupment or reduction of compensation due to compliance violations or misconduct."

In addition to the ECCP changes, DOJ is rolling out a three-year Pilot Program, effective March 15, 2023. Pursuant to the Pilot Program, DOJ's Criminal Division will:

1. require companies entering into criminal resolutions to "implement compliance-related criteria in their compensation and bonus system and to report to the Division about such implementation during the term of such resolutions," and

2. "consider possible fine reductions where companies seek to recoup compensation from culpable employees and others who both a) had supervisory authority over the employee(s) or business area engaged in the misconduct and b) knew of, or were willfully blind to, the misconduct."

Prosecutors are directed to integrate compliance-related criteria tied to compensation and bonuses into all corporate resolutions during the Pilot Program. Such criteria could include a prohibition on bonuses for employees who do not satisfy compliance performance requirements, disciplinary measures for employees who violate applicable law (and potentially their supervisors as well) and incentives for employees who demonstrate full commitment to compliance processes.

Likewise, the Pilot Program provides that an additional fine reduction may be warranted where a company:

1. fully cooperates and timely remediates (as defined in the ECCP),

2. demonstrates it has implemented a program to recoup compensation from employees who engaged in wrongdoing in connection with the conduct under investigation (or others in supervisory capacities), and

3. has, in the DOJ's estimation, demonstrated good faith in initiating a process to recoup such compensation before the time of resolution.

In these circumstances, DOJ will reduce "the fine in the amount of 100% of any such compensation that is recouped during the period of the resolution."

Consequence Management

Relatedly, the ECCP provides guidance for prosecutors to consider whether a company has effective "consequence management" procedures in place that allow it to identify, investigate, discipline and remediate violations of law or misconduct. Prosecutors may consider whether a company has publicized disciplinary actions internally (as a deterrent effect) and whether it is tracking data related to disciplinary actions, compliance-related allegations and compliance investigations. Prosecutors are also directed to consider whether a company has effective human resources processes in

place to ensure consistent application of compliance-related investigation procedures and disciplinary actions.

Guidance on Use of Personal Devices, Communications Platforms and Messaging Applications

DOJ also revised the ECCP to include new guidance on how it will consider corporate practices on the use of personal devices, messaging applications (including ephemeral messaging) and communications platforms in the workplace.

DOJ will evaluate a corporation's policies governing electronic devices and data against the backdrop of the company's risk profile and specific business needs, all the while assessing the company's ability to access and preserve electronic data and communications. In conducting this evaluation, prosecutors are directed to consider three factors:

1. **Communication Channels.** DOJ will consider what electronic communications channels the company and its employees use or can use to conduct business. It will consider whether the company's policies and practice vary by jurisdiction or business unit, and will look at the mechanisms the company has put in place to manage and preserve information within those electronic communication channels.
2. **Policy Environment.** DOJ will look at the policies the company has in place to allow it to secure, monitor or access business-related communications. If the company has a "bring your own device" (BYOD) program, DOJ will consider whether the company maintains policies for preserving and accessing data and communications on those devices, as well as the policies or procedures in place to ensure that communications and other data is preserved from devices that are replaced.
3. **Risk Management.** DOJ will consider whether the company's approach to permitting and managing communication channels, including BYOD and messaging applications, is reasonable in the context of its business needs and risk profile, and, in particular, will assess whether the use of personal devices or messaging apps, including ephemeral messaging applications, has impaired the company's compliance program and its ability to conduct internal investigations or respond to requests from prosecutors, civil enforcement or regulatory agencies.

As Polite made clear, DOJ will expect companies to maintain, communicate and enforce policies that ensure that "business-related electronic data and communications can be preserved and accessed," regardless of the medium on which they are maintained. Where companies fail to produce communications, prosecutors will ask about where they are stored and the company's ability to access them. Polite was pointed in noting that "a company's answers—or lack of answers—may very well

affect the offer it receives to resolve criminal liability. So when crisis hits, let this be top of mind."

Focus on National Security-Related Compliance Enforcement

Finally, Deputy Attorney General Monaco announced in her speech that DOJ would be making significant resource investments in the DOJ's National Security Division so that the division is better able to focus on the intersection of corporate crime and national security. Citing the importance of sanctions and export control enforcement in US national security, Monaco noted that corporations "are on the front lines of today's geopolitical and national security challenges" and that "corporate criminal investigations carry profound national security implications."

Monaco admonished business leaders to take sanctions seriously, noting that DOJ is presently handing "corporate investigations that involve sanctions evasion" across the globe, in industries as varied as transportation, financial technology, banking, defense and agriculture. According to Monaco, "sanctions are the new FCPA."

To better equip DOJ in these efforts, Monaco announced a surge in resources to address the intersection between corporate crime and national security, including hiring 25 new prosecutors to investigate sanctions evasions, export compliance and other economic crimes.

In addition, NSD will begin issuing joint advisories with the US Department of Commerce and the US Department of the Treasury to inform the private sector about enforcement trends and "convey [DOJ's] expectations as to national security-related compliance."

Summary

DOJ's latest guidance provides tangible considerations for all companies to consider for their compliance programs. Details from the ECCP and Pilot Program provide companies and their compliance officers and employees the benefit of particular expectations and benchmarks from DOJ. It remains to be seen how the new guidance will pan out in practice, however.

For instance, while DOJ notes that the new revisions are intended to provide transparency around DOJ policy, prosecutors will retain significant discretion over, among other things, fine reduction recommendations and subjective assessments of "good faith" efforts to clawback compensation and overall effectiveness of compliance programs. This is particularly the case where prosecutors have broad discretion to require companies entering into criminal resolutions to implement the broadly worded "compliance-related criteria" in their compensation systems. It remains to be seen

whether different prosecutors can cohesively implement such a policy with a measure of predictable consistency.

Additionally, the broad scope and coverage of DOJ's guidance is significant. In contrast to specific rules that exist for public companies and regulated entities (such as broker-dealers and investment advisers) around recordkeeping obligations and executive compensation clawbacks, DOJ's guidance applies to all companies. The practical result may mean that private entities currently not subject to existing obligations under the federal securities laws will likely need to consider the implementation of similar programs implemented.

Finally, many companies have likely not paid much attention to sanctions and national-security related issues when building out their compliance programs. To the extent that sanctions do in fact become "the new FCPA," companies will need to bolster or implement policies and procedures that ensure the same degree of corporate compliance in the sanctions context as has become standard in the FCPA context.

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September 8, 2023

XBRL: Enforcement's Not-So-Secret Weapon

I have to say that I never thought I would write three blogs in one day on the topic of XBRL, but if the Staff thinks it is important, I will do my part to get on board. And here is something that truly caught my eye from the SEC's 2023 Semi-Annual Report to Congress on structured data disclosures:

> Enforcement utilized risk-based data analytics to uncover potential accounting and disclosure irregularities caused by, among other things, earnings management practices. Machine-readable data enabled Enforcement staff to review the financial data of thousands of public issuers in order to detect indicia of earnings management or other types of financial misconduct. The initiative resulted in charges against six public companies and several related individuals for violations of the federal securities laws for engaging in certain practices that gave the appearance of meeting or exceeding consensus earnings-per-share (EPS) estimates.

I blogged about the latest of those cases back in February – and I pointed out that the SEC's data analytics tools are now sensitive enough to flag potential "earnings management" situations even when the adjusted dollar amounts are small. That's because of XBRL! Now that the SEC has a solid dataset in its toolbox, it is becoming easier for the Enforcement Division to detect and pursue accounting issues.

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/blog/2023/09/xbrl-enforcements-not-so-secret-weapon.html

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September 29, 2023

Some People Never Learn: A Continuing SEC Enforcement Sweep Rears its Head

Earlier this week, Alan Dye noted on the Section16.net blog that the SEC announced cease and desist orders against five issuers and six individuals based on violations of Section 16(a), Section 13(d) and Item 405 disclosure obligations. Alan's blog notes:

> [I]t looks like:
>
> All of the five issuers were charged with "causing" Section 16(a) violations by undertaking but failing to assist insiders with Section 16(a) reporting requirements
>
> Three of the issuers also were charged with violating the proxy and 10-K disclosure requirements by failing to disclose insiders' reporting violations under Item 405
>
> Three of the individuals were officers or directors and were charged with violating Section 16(a)
>
> The other three individuals were 10% owners of one or more companies and were charged with failure to comply with Sections 13(d) and 16(a).
>
> All of the respondents consented to the orders and civil money penalties. Most of the alleged violations occurred in the 2017-2022 timeframe, but the SEC's press release suggests that there may be more to come—it says today's orders are part of "the SEC's ongoing investigation of potential beneficial ownership violations."

You may recall that we last saw a series of Section 16 and beneficial ownership reporting sweep cases way back in 2014.

– Dave Lynn

Posted by David Lynn
Permalink: https://www.thecorporatecounsel.net/blog/2023/09/some-people-never-learn-a-continuing-sec-enforcement-sweep-rears-its-head.html

← More on XBRL: The Importance of Scale | Main | Del. Chancery Upholds Disparate Voting Rights for Same Class of Stock →

October 4, 2023

Whistleblower Enforcement: Fix Your NDAs (And Everything Else)!

Last week was fiscal year end for the federal government, including the SEC and other agencies. In the face of the shutdown threat, the Commission plowed forward with its customary year-end enforcement spree, making every effort to add to the government's bottom line. The WSJ reported that they brought in $218 million in fines last Friday alone – 10% of the Commission's annual budget!

Included in the pile of settlements announced during the last 10 days of the month were two (!) instances of the SEC taking issue with non-disclosure provisions in separation or employment agreements that, in the SEC's view, discouraged potential whistleblowers from voluntary contacting the SEC about potential securities law violations, and thereby violated Rule 21F-17.

> For those who may not remember, Rule 21F-17 became effective as part of the Dodd-Frank Act in August 2011. In the big picture, that's not that long ago. So, maybe it's not too surprising that these provisions continue to linger on in forms – especially because stray language can appear in various overlapping policies, agreements, and acknowledgement pages that are handled by different departments. In the SEC's view, that's not a good excuse.

Anyway, these two actions followed a similar announcement earlier in the month (so that's 3 total just this past month, for anyone counting at home). That brings the running total of Rule 21F-17 enforcement actions to "nearly 20" since 2015, according to one of the recent orders. In these instances, both companies added language and/or sent communications to employees following the first wave of enforcement actions in 2015 to clarify that the provisions shouldn't be construed to prevent whistleblower claims. But in the SEC's view, that didn't fully address the problem. Here's why:

> 1. In this case, the SEC viewed the new language as prospective in nature, and not a cure for restrictions on disclosure from 2011 to 2015. The Commission noted that it wasn't aware of any specific instances in which a former employee was prevented from communicating with the Commission Staff about potential securities law violations, or in which the company took action against a former employee based on the non-disclosure representation. The company cooperated with the SEC's investigation, initiated a remediation program, and agreed to a $375k fine as part of the settlement.
>
> 2. In this case, the company continued to use an employment agreement without a whistleblower carveout for years after revising other policies, and after that, continued to use a release at the time of separation that reminded employees of confidentiality requirements (without a carveout). The Commission didn't like that severance and deferred comp were conditioned on signing the release, and also said it was aware of one former employee who was initially discouraged from submitting a whistleblower complaint. The company cooperated with the SEC on remedial steps. They were fined $10 million!

Enforcement Director Gurbir Grewal shared this warning in the SEC's announcement about the second case:

> “Entities employing confidentiality, separation, employment and other related agreements should take careful notice of today’s enforcement action,” said Gurbir S. Grewal, Director of the SEC’s Division of Enforcement. “The Commission takes seriously the enforcement of whistleblower protections and those drafting or using these types of agreements should take equally serious their obligations to ensure that they don’t impede whistleblowers from contacting the Commission.”

– **Liz Dunshee**

Posted by Liz Dunshee
Permalink: https://www.thecorporatecounsel.net/blog/2023/10/whistleblower-enforcement-fix-your-ndas-and-everything-else.html

October 13, 2023

Demystifying SEC Investigations

Woodruff Sawyer recently released the first in a two-part series meant to demystify SEC investigations for directors and officers. Part one focuses on the investigative stage and begins with this note about the sheer volume of tips and investigations the Division of Enforcement receives and addresses annually:

> The SEC receives tens of thousands of enforcement tips every year. SEC Enforcement has almost 1,500 staffers and about 1,500 open investigations at any given time across the country. […] SEC Enforcement lawyers can and will open an investigation any time they believe it is possible that a securities law violation has occurred. In practice, this means that they can open investigations freely, at any time, and for any legitimate, non-discriminatory reason.

The post explains that there are a few "procedural paths" the investigation can take and which path the Division of Enforcement chooses can be indicative of the Division's initial expectations about the investigation:

> An encounter with the SEC can fall anywhere on a wide spectrum of pain, from expensive procedural annoyance to substantive existential threat. […] [T]he bureaucratic posture of an investigation can be important: The posture can hint at whether the government is just kicking the tires and may walk away after a limited review or whether they are likely to dig in for the long haul.

Through a helpful flow chart, the post describes those two initial paths — opening a "matter under inquiry (MUI)" or an investigation — and their implications and then summarizes the subsequent documents phase and possible testimony phase. Maybe most importantly, the post describes the ways that a government investigation differs from private litigation and has this reminder to manage the expectations of all involved:

> Once a formal order exists, you should be prepared for a long road ahead. On average, it takes about two years from the time the SEC opens an investigation to the time it brings a case. (This statistic doesn't include investigations closed without charges; unfruitful investigations also often drag on for years.) Over the course of an investigation, you will see flurries of activity and then long periods of inactivity and uncertainty. While the government considers the documents you've produced and mulls over the next steps, it won't provide the company with much information about where things are headed.

– **Meredith Ervine**

Posted by Meredith Ervine
Permalink: https://www.thecorporatecounsel.net/blog/2023/10/demystifying-sec-investigations.html

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October 18, 2023

SEC Enforcement: When Does Cooperation Move the Needle?

Senior officials at the SEC's Division of Enforcement have long touted the potential benefits that companies may derive by cooperating with its investigations, but it's not always clear what companies have to do to move the needle. This K&L Gates memo looks at the terms of recent settlements and identifies some of the cooperation factors that are likely to contribute to reduced penalties – or even a decision not to impose penalties. Here's an excerpt:

> First, an important driver in whether a penalty is imposed is whether the entity promptly self-reports potential misconduct upon learning it or not. In each of the actions described above that did not impose a penalty, the entity self-reported the conduct to the SEC.
>
> A second factor cited in the orders is the extent to which the entity provides information to the staff as it investigates the matter. Among the actions cited favorably are hiring outside counsel to conduct an independent internal investigation, providing the SEC with facts developed in that internal investigation (including presentations of interim findings and highlighting key documents and witnesses), promptly making witnesses available, providing detailed explanations of factual issues, facilitating testimony of former employees, providing relevant documents without requiring subpoenas, and providing translations of foreign-language materials.
>
> Third, the SEC has highlighted that the entities voluntarily took remedial measures in response to the issues discovered. Such measures have included replacing management and board members, commencing an audit of compliance programs, revising procedures, holding compliance trainings with employees, creating employee guides or toolkits with commonly asked questions regarding the federal securities laws, and voluntarily ceasing the at-issue conduct.

If this sounds familiar, it probably should, because the memo points out that these are the same type of actions that the DOJ looks for when it assesses whether cooperation credit is appropriate.

Despite the SEC's statements and the evidence provided by recent settlements, many companies are still skeptical about whether there's much upside in going above and beyond in cooperating with the SEC. The memo acknowledges that this isn't an irrational concern. That's because the SEC isn't exactly a model of consistency, and sometimes imposes significant penalties notwithstanding a high degree of cooperation by the company involved in the enforcement action.

– **John Jenkins**

Posted by John Jenkins
Permalink: https://www.thecorporatecounsel.net/blog/2023/10/sec-enforcement-when-does-cooperation-move-the-needle.html

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October 26, 2023

Chief Compliance Officers in the Spotlight

Earlier this week at the New York City Bar’s Compliance Institute, SEC Enforcement Director Gurbir Grewal outlined the rare circumstances in which the SEC may bring enforcement action individually against compliance professionals. Grewal noted that these circumstances include when the individual affirmatively participates in misconduct unrelated to compliance, when an individual misleads regulators or when there has been a wholesale failure in carrying out compliance responsibilities. Grewal further stated “We don’t second guess good faith judgments of compliance personnel — good faith judgments that are made after reasonable inquiry and reasonable analysis.” In the speech, Grewal noted:

> But it is clear that we cannot reverse those trends and enhance Americans’ trust in our financial institutions through our efforts alone. We need your help to do so. We need to work together to create what I call a culture of proactive compliance.
>
> In many ways, it’s each of you – the compliance professionals, consultants, attorneys, accountants, and others in this space – that serve as the first lines of defense against misconduct.
>
> You are the ones that can work with firms to implement effective policies and procedures to ensure that those firms comply with their legal obligations on the front end, so that, instead of reading about compliance failures, the public understands that organizations like yours are proactively doing what they can to be compliant.
>
> This is by no means easy work. Creating a culture of proactive compliance requires three things: **education**, **engagement**, and **execution**.

Grewal outlined actions necessary for proactive compliance and the need to execute based on meaningful policies and procedures.

– Dave Lynn

Posted by David Lynn
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