

Clients & Friends Memo

COVID-19 Update: What Are the Effects on the SEC's Enforcement Program?

April 3, 2020

In response to the COVID-19 crisis, the SEC has sought to reassure investors and the financial industry that it is maintaining its investor protection and enforcement efforts. In a [statement](#) setting out the Commission's initial response to the crisis, issued on March 20, the SEC pledged that its enforcement and examination programs will continue to execute their missions and are fully operational.

The Enforcement Division is focused on monitoring the markets for misconduct related to the COVID-19 crisis. In a [statement](#) issued on March 23, 2020, the Co-Directors of the Division of Enforcement “emphasize[d] the importance of maintaining market integrity and following corporate controls and procedures.” In particular, they noted that material nonpublic information available to corporate insiders may be even more valuable during the COVID-19 crisis and cautioned people with access to material non-public information—including “directors, officers, employees, consultants and other outside professions”—to be “mindful of their obligations to keep this information confidential and comply with the prohibitions on illegal securities trading.” The Co-Directors urged public companies to be aware of their disclosure obligations, including “established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions[.]” They also reminded investment professionals that they must comply with policies and procedures designed to prevent misuse of material nonpublic information.

For now, it looks like the SEC is making good on its word, having announced a flurry of new enforcement actions in the past week as if trying to prove its commitment to zealous enforcement during the crisis. It recently suspended trading in the securities of two companies for COVID-19 related conduct. Trading in the first company's shares was [suspended](#) due to concerns about, among other things, information in the marketplace disseminated by third parties concerning the viability of the company's product to treat COVID-19. Trading in the second company's shares was [suspended](#) due to concerns about, among other things, information in the marketplace about the company's marketing rights to a COVID-19 treatment. Moreover, anecdotal evidence suggests

that the staff is pushing investigations forward by issuing subpoenas, chasing parties for document productions, making Wells calls, etc.

Practical Effects on SEC Enforcement

Of course, the SEC's enforcement efforts are not unaffected by COVID-19. The SEC's cases in active litigation are being impacted by the various court closures and related delays throughout the country. In addition, like many of us, SEC enforcement staff is working from home and facing significant travel restrictions. The Co-Directors recently held a virtual town meeting for Division of Enforcement staff where they stressed that work must go on but acknowledged inevitable challenges and delays. They encouraged the staff to do their best under the circumstances and be accommodating within reason.

Where the COVID-19 crisis will likely have the biggest impact is situations that would normally call for face-to-face interaction. This includes investigative testimony as well as meetings with the staff such as Wells meetings, pre-Wells meetings, evidence reviews and attorney proffers. Initially, the staff delayed or rescheduled testimony and in-person meetings to later this spring. In many instances, they are now requesting that testimony and other in person meetings go forward telephonically, by video conference, or via web-based programs. In some instances, the staff has agreed to accept informal phone interviews or attorney proffers in lieu of official sworn testimony. Companies and individuals who are involved in ongoing investigations should expect requests of this nature going forward.

Considerations for Remote Interactions with Staff

Companies and individuals should be thoughtful about how they approach remote testimony and other remote meetings that would normally be held in person, including thinking carefully about whether they agree to such a request. While the ability to work remotely has allowed many of us to continue working effectively during social distancing, there can be significant disadvantages in the context of a SEC investigation.

These disadvantages are most apparent with investigative testimony. For example, take the situation where a witness and his or her counsel do not live in the same city and neither is allowed to travel due to COVID-19 concerns. Under these circumstances, it will be difficult for the witness to adequately prepare for testimony if he/she cannot meet with counsel in person before testifying, and difficult for counsel to effectively represent the witness during testimony if they are not in the same room. The same concerns are present for informal witness interviews. It remains to be seen how hard the SEC pushes for remote investigative testimony given the unique situation and complications COVID-19 has caused.

There are also disadvantages to remote meetings solely between defense counsel and staff. Simply put, there is no substitute for face-to-face meetings in terms of being able to “read the room” and effectively advocate a position. Therefore, as a practical matter, it is far less likely that a witness or counsel will be able to change the staff’s minds over the phone or via videoconference. It can be more difficult to be an effective advocate, read and respond to your audience and deliver your message with conviction via a phone call or video conference. While the SEC staff will likely seek these kinds of meetings moving forward, parties should think carefully about pushing back and delaying the meeting until after the crisis—especially if it is critical, like a Wells meeting or sensitive attorney proffer.

Given how rapidly the COVID-19 crisis is changing, the SEC’s response and path forward is evolving in real time. We will continue to monitor these events and apprise you as future developments warrant.

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