SEC DISCUSSES COVID-19 PANDEMIC-RELATED ENFORCEMENT PRIORITIES

Hodgson Russ Business Litigation Alert
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The Securities and Exchange Commission has formed a Coronavirus Steering Committee to proactively identify and monitor areas of potential misconduct related to the coronavirus pandemic. The Division of Enforcement's Co-Director, Steven Peikin, announced the Steering Committee's formation during his May 20 keynote address to the Securities Enforcement Forum West 2020. Mr. Peikin addressed particular areas of focus and enforcement priorities for the Division of Enforcement as a result of the coronavirus pandemic.

Coronavirus Steering Committee:

Mr. Peikin and Co-Director Stephanie Avakian established the Steering Committee in late March following the Enforcement Division's public statements noting the increased number of corporate insiders with access to material nonpublic information. At that time, the Enforcement Division also urged companies to follow their disclosure controls and procedures to protect against the improper dissemination and use of such information. The Division's March 23 statement can be found **here.**

The Steering Committee is comprised of two dozen members from across the Enforcement Division, including representatives from various specialized units, home and regional offices, and from the Office of Market Intelligence. Its mandate is "to proactively identify and monitor areas of potential misconduct, ensure appropriate allocation of our resources, avoid duplication of efforts, coordinate responses as appropriate with other state and federal agencies, and ensure consistency in the manner in which" the Enforcement Division addresses coronavirus-related matters.

Enforcement Priorities:

Reflecting on experiences and lessons learned in previous public health crises and periods of national emergency resulting in serious market disruption, the Committee has identified key areas of potential market and investor risk where it is prioritizing enforcement activity, including:

- **Microcap Fraud:** The Committee has identified the potential for fraud in microcap stocks (often defined as small companies with a market capitalization of less than $300 million). Prior public health crises like Hurricane Katrina and the 2014 Ebola crisis were followed by fraudulent efforts in the microcap space

Attorneys

Jane Bello Burke
Carmine Castellano
William Ciszewski III
Marissa Coheley
Catherine Grantier Cooley
Ryan Cummings
Reetuparna Dutta
Joshua Feinstein
Patrick Fitzsimmons
Emily Florczak
Rob Fluskey
Neil Friedman
Jodyann Galvin
Joseph Goldberg
Michael Hecker
Julia Hilliker
Patrick Hines
Ryan Lucinski
Cynthia Ludwig
Charles Malcomb
Jason Markel
Christopher Massaroni
Michael Maxwell
Michelle Merola
Jacqueline Meyer
Matthew Parker
Scott Paton
Adam Perry
Alexandria Rowen
Hugh Russ III
Peter Sahasrabudhe
Aaron Saykin

characterized by false and misleading claims about treatments and disaster-response capabilities. The coronavirus pandemic is not expected to be different. Mr. Peikin noted that the Committee is focusing on potentially fraudulent stock promotions and claims concerning COVID-19 testing materials, developments of treatments or vaccines, and access to personal protective equipment.

- **Insider Trading and Market Manipulation:** The Committee also identified an enhanced risk of insider trading and market manipulation due to extreme market volatility and an increase in issuer announcements providing market-moving information. The Committee is working closely with the Enforcement Division's Market Abuse Unit to monitor trading activity and suspicious market activity following issuer announcements in industries that have been particularly impacted by the pandemic.
- **Financial Statement and Issuer Disclosure Frauds:** Based upon experience gained by the Enforcement Division during prior economic downturns, an increased risk to investors from fraudulent financial statements and disclosures as a result of the COVID-19 pandemic may manifest itself in two ways: (1) exposing pre-existing accounting or disclosure improprieties; and (2) issuers engaging in improper conduct. In the first category, the Committee is focused on disclosures, impairments or valuations that attempt to disguise pre-COVID-19 problems as coronavirus-related. As part of the Committee's focus on the second point, the Committee has developed a process for reviewing public filings from issuers in highly-impacted industries to identify disclosures that appear to be significantly different from others in the same industry.
- **Investment Adviser and Investment Company Misconduct:** The Committee is monitoring investment advisers and investment companies for failures to honor redemption requests at both private funds and registered investment companies in conjunction with the Asset Management Unit. Along with the Complex Financial Instruments Unit, the Committee is also monitoring the impact of the pandemic on the performance of complex structured products and also seeking to identify improper marketing and sales of those products.

Enforcement Examples:

The Committee is enforcing these priorities through trading suspensions, accelerated investigations, and civil actions. Since February 7, 2020, the SEC has suspended trading of more than 30 securities issuers resulting from questions about the adequacy and accuracy of coronavirus-related information. The SEC may suspend trading in a stock "if in its opinion the public interest and the protection of investors so require." 15 U.S.C. § 78l(k)(1). The SEC typically suspends a stock from trading when there are questions about whether public information about the issuer is accurate,

Christian Soller

Daniel Spitzer

Jeffrey Stravino

Melissa Subjeck

Michael Zahler

James Zawodzinski Jr.

Benjamin Zuffranieri Jr.

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Securities/Directors & Officers Litigation adequate, or reliable. It may suspend trading in any stock for up to ten days to allow time for an investigation of potential fraud or misconduct.

If an investigation reveals fraud or misconduct, the SEC can commence a civil action against the issuer, which is designed to deter and punish improper conduct, and, in some cases, compensate harmed investors. For example, the SEC suspended trading of Praxsyn Corporation's stock on March 25, 2020 due to concerns over the accuracy of its claims in press releases about having and being able to obtain large quantities of N-95 masks. After an investigation and a finding of misconduct, the SEC filed suit against Praxsyn and its CEO on April 28, 2020 in federal court in Florida.

Other examples include two complaints filed on May 14, 2020. The SEC filed a complaint against Applied BioSciences concerning its March 31 press release stating it had begun offering finger-prick COVID-19 tests to the general public for home use. The SEC's complaint alleges that the tests were not, in fact, intended for home use by the general public but, instead, could only be administered in consultation with a medical professional. The complaint also alleges that Applied BioSciences failed to disclose the tests were not authorized by the U.S. Food and Drug Administration. The company is charged with violating antifraud provisions of the federal securities laws and seeks permanent injunctive relief and civil penalties.

The SEC also filed a complaint against Turbo Global and its CEO, Robert W. Singerman. The suit alleges that the company issued false and misleading press releases concerning a purported public-private partnership to sell thermal scanning equipment to detect people with fevers. In those press releases, Mr. Singerman also claimed that the technology is "99.99% accurate" and could be deployed immediately to each state. The complaint alleges that there was no agreement or public partnership to sell the product, and that Mr. Singerman drafted the press releases, which he knew to be false and seeks permanent injunctive relief and civil penalties, and an officer and director bar against Mr. Singerman.

Takeaways:

Publicly-traded companies, securities issuers, and investment advisers should be particularly vigilant about any public statements or financial disclosures or offerings during the coronavirus pandemic. To avoid an SEC enforcement investigation, public companies should do their best to adhere to their established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and selective disclosure prohibitions to seek to ensure that they protect against the improper dissemination and use of material nonpublic information.

If you have any questions about this alert, or need assistance complying with SEC disclosure requirements or drafting press releases, please contact Craig M. Fischer (716.848.1266). If you need assistance responding to regulatory inquiries/investigations, please contact Jodyann Galvin (716.848.1520).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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