Client Update
SEC Leadership Discusses Continuing Priorities

SEC Chairman Jay Clayton, Co-Directors of Enforcement Stephanie Avakian and Steven Peikin, and Acting Director of the Office of Compliance, Inspections and Examinations ("OCIE") Peter Driscoll participated in a panel discussion on Tuesday, September 5, at NYU Law School. The moderated discussion, followed by questions from the audience, was titled "The Securities and Exchange Commission: Priorities Going Forward."

In sum, the SEC officials emphasized that investors should expect no major shift from the SEC in terms of enforcement or examinations. While there has been some discussion in recent months of frauds victimizing retail investors, there will not be a major paradigm shift in the kinds of cases the Commission will focus on. The panelists also spent a significant amount of time discussing cybersecurity and cyber-related enforcement actions, as well as the SEC's increased use of big data in investigations and examinations.

HIGHLIGHTS OF THE DISCUSSION

Focus on Retail Investors

A major theme throughout the discussion was the SEC's renewed focus on protecting retail investors, but the panelists emphasized that there will be no "pendulum swing" with regard to SEC enforcement. Co-Director Avakian stressed that protecting retail investors does not require a trade-off with enforcement in other areas, and that prosecuting misconduct in most areas will ultimately assist retail investors. The Chairman noted that focusing on market integrity, high-frequency trading, and complex financial instruments ultimately protects retail investors, as well as the rest of the market.

Continued Focus on Individual Accountability

Chairman Clayton stated that the Enforcement Division would continue to emphasize individual accountability. Enforcement Co-Director Avakian noted that more than 70% of cases in the last five years had involved individuals.

Increased Emphasis on Cyber

The heads of Enforcement and OCIE both noted that cyber vulnerabilities at various firms create systemic market risk, and that the agency will continue its efforts to ensure that registrants are taking appropriate steps to safeguard personal information. Enforcement Co-Director Avakian also noted an increased focus on prosecuting individuals who trade on material nonpublic information obtained through cyber intrusions, as well as an emphasis on whether firms were appropriately addressing cyber issues in their public disclosures.

Distributed Ledger Technology ("DLT")

The Enforcement Co-Directors noted an increased focus on Initial Coin Offerings and distributed ledgers. Co-Director Peikin discussed that this focus included investigating firms that raised funds through fraudulent Initial Coin Offerings ("ICOs") or other schemes, firms that sold coins or other distributed ledger offerings that were unregistered and did not qualify for any exemptions, and firms and individuals that sold such offerings without appropriate broker-dealer registration. He referenced the Commission's recent 21(a) report in the DAO matter and predicted there would be more activity in this area, noting that the SEC has formed a DLT working group, comprising 90 people across the agency, to focus on the risks posed by DLT.

Critical Focus on Self-Reporting

Encouraging self-reporting will continue to be a "critical focus" of the Enforcement Division, Co-Director Avakian noted, but it is only a part of the overall package of corporate cooperation that the Commission will consider in determining appropriate charging and remedy decisions. When asked if the agency would enter deferred prosecution agreements or non-prosecution agreements in matters where the company did not self-report, the Co-Directors emphasized that particularly outside the Foreign Corrupt Practices Act ("FCPA") area, a number of factors will be considered in assessing an entity's cooperation and they may consider such dispositions even for companies that did not self-report.

Automatic Disqualifications and Waivers

When asked about the SEC's approach to granting waivers from automatic disqualifications, both the Chairman and the Enforcement Directors said they recognized that firms needed to understand whether the disqualifications would apply before agreeing to settlements and said they were attempting to ensure that firms had this certainty before they committed to settlements.

Continued Approach to Admissions

Enforcement Co-Director Peikin stated that the SEC will continue the approach to admissions initiated under the prior administration and would, in appropriate cases, determine not to settle unless the defendant or respondent admitted to the alleged facts and a legal violation. He couldn't predict in which cases such admissions would be required or whether the number of admissions would increase or decrease.

Vigorous FCPA Enforcement

Both the Chairman and Enforcement Co-Director Peikin stated definitively that the SEC would continue to vigorously enforce the FCPA. Chairman Clayton noted that increased enforcement efforts in other jurisdictions over the last five years had "changed the dynamic" of these investigations and made US enforcement more appropriate now that such investigations were no longer a "unilateral exercise."

No Plans for Insider Trading Statute

When asked if the SEC would endorse a Congressional insider trading statute, Chairman Clayton said that he was satisfied with the agency's prosecution of insider trading cases, and that he had no plans to seek insider trading legislation. He noted that other countries with insider trading statutes did not have better experiences with enforcing that law than the United States.

Evolution of OCIE Examinations

OCIE Acting Director Driscoll explained that OCIE has changed the way its exams are conducted in order to focus its staff's time and efforts most productively. Exams are now more risk-based, more targeted, require firms to produce more documents in advance of the exam, and comprise more initiative-based work than before.

OCIE Focus: Retail Investors and Seniors

Much of OCIE's effort to protect seniors and retail investors involves focusing on the advice provided to these individuals—particularly advice coming from "robo advisers" and from recidivist advisers, who provide poor advice then jump from firm to firm. OCIE will also continue to focus on firms' procedures in place for vetting employees who provide investment advice, as well as on management decision-making at large funds with retail investor participation like exchange-traded funds.

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