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June 03, 2024

Securities Enforcement Forum West 2024: SEC Reinforces Cooperation Requirements and Enforcement Priorities



Senior Division of Enforcement officials from the U.S. Securities and Exchange Commission (SEC) spoke with SEC alumni, private practitioners, and other professionals in the field at the Securities Enforcement Forum West 2024 (the Forum), which was held on May 23, 2024, in Palo Alto, California.

Forum panelists described recent trends in the SEC's enforcement actions, its regulatory agenda, and upcoming priorities. Cooperation remained a central focus for many panelists, including Director of the Enforcement Division Gurbir Grewal. Panelists also discussed enforcement priorities, including "shadow trading," cryptocurrency, gatekeeper liability, artificial intelligence (AI), and cybersecurity.

Cooperation Requirements Remain Constant

Director Grewal focused his [remarks](#) on cooperation, reaffirming the well-established analytical framework used to evaluate company cooperation set forth in the [Seaboard Report](#) and describing the benefits that can be realized from cooperation.

Assessing Cooperation

While Director Grewal reiterated the four key principles outlined in the *Seaboard Report* (self-policing, self-reporting, remediation, and cooperation), he also identified a fifth: collaboration. Despite this novel classification, the sentiment underlying collaboration is familiar. For example, Director Grewal explained that registrants should collaborate with staff early, often, and substantively and establish quality communication—fact-based communications that are relevant to an investigation—with staff so that any issues that arise can be quickly discussed. This is consistent with [previous remarks](#) from Enforcement Division leadership and recently settled enforcement actions like [Cloopen Group Holding Limited](#), where Cloopen provided detailed explanations of the transactions at issue and cooperated in other ways that substantially

advanced the SEC's investigation (*e.g.*, summarizing interviews of witnesses located in China and identifying and translating key documents).

Benefits of Cooperation

Director Grewal also encouraged cooperation by addressing how companies may benefit from it. He emphasized that there are concrete benefits to cooperation, including: (1) no or reduced charges or penalties; (2) no or more narrow undertakings where remediation is timely and addresses the misconduct at issue; and (3) reference to the cooperator's positive conduct—cooperation—in the SEC's findings (where, in the absence of cooperation, entirely negative conduct may otherwise be reflected).

Director Grewal reassured Forum attendees that certain investigations do indeed result in declinations. The public, however, is often unaware because the SEC does not publish declinations, and those who receive declinations rarely wish to reveal involvement in an SEC investigation. Director Grewal acknowledged that it can be difficult for registrants to understand the facts and circumstances that warrant a declination and announced that the SEC is thinking about how to share that information.

Enforcement Agenda

Forum panelists also discussed the SEC's current enforcement agenda, spotlighting issues that are at the forefront.

"Shadow Trading"

Panelists pointed to "shadow trading" and the recent jury verdict in favor of the SEC in [Panuwat](#) as an example of the SEC's willingness to look outside of the box when pursuing insider trading cases. In *Panuwat*, the defendant used material nonpublic information from his employer to trade in the securities of a different company in violation of his employer's insider trading policies. Panelists encouraged companies to review and update their policies as needed to address shadow trading risks and educate their employees about those policies.

Digital Assets and Cryptocurrency

Staff reiterated the SEC's focus on cryptocurrency, including misconduct such as fraud, unregistered cryptocurrency asset offerings, and unregistered market intermediaries. Recently settled enforcement actions, including [Impact Theory](#) and [Stoner Cats](#), for example, make clear that non-fungible tokens are securities and, therefore, must be registered as required by the Securities Act of 1933 prior to being sold.

The U.S. Department of Justice is also focused on the cryptocurrency industry, as Claudia Quiroz, Director of the National Cryptocurrency Enforcement Team (NCET), explained. The NCET is prioritizing "mixer" cases. Mixers are services that obscure the origin of cryptocurrency transactions and are often utilized to launder money. In fact, the founders of a company that offered mixer services, Tornado Cash, were recently [charged](#) with money laundering in the U.S. District Court for the Southern District of New York.

Gatekeeper Liability

Gatekeeper liability continues to be an enforcement priority. In particular, panelists highlighted recent enforcement actions against auditors. For example, the SEC recently settled an enforcement action against the audit firm [BF Borgers CPA PC](#) and its owner for deliberate and systemic failures to comply with Public Company Accounting Oversight Board standards. The SEC found several failures, including failure to adequately supervise the audit team, prepare and maintain proper audit documentation, and obtain engagement quality reviews. Panelists noted that there are several categories of auditor-related enforcement actions that have

been brought over the last year, including enforcement actions related to quality controls, the failure to meet audit standards, and auditor independence. Because auditors and other gatekeepers play a critical role in protecting investors' interests, we will likely continue to see enforcement resources devoted to this issue.

Artificial Intelligence

Panelists discussed AI and the risks associated with it, which can contribute to fraud and other securities law violations. One such risk is "AI washing," which occurs when a company makes false or misleading statements about the capabilities or use of its AI. The SEC recently [settled](#) AI washing enforcement actions in March 2024 with two investment advisers, Delphia (USA) Inc. and Global Predictions Inc., that made false and misleading statements about their use of AI and its capabilities. Additional AI-related risks include targeted fraud through written solicitation and deep fakes.

Panelists noted that registrants can manage AI-related risks by conducting an AI audit, reviewing and updating internal policies, and educating and training employees on those policies.

Cybersecurity

Cybersecurity was a common topic of discussion at the Forum. The recent motion to dismiss briefing in the [SolarWinds](#) litigation, where the SEC has brought cybersecurity enforcement claims against an individual for the first time, was heavily discussed, along with the role chief information security officers play in materiality assessments when making disclosures. Panelists noted that it is not always obvious what the SEC considers to be an appropriate response to a cyber event. Given the SEC's continued focus on cybersecurity, panelists encouraged registrants to design cyber procedures to fit their business model and to update those procedures regularly.

Key Takeaways

Throughout the Forum, panelists emphasized the importance of cooperation and opined on the SEC's current enforcement priorities, leaving market participants with these key takeaways:

- Cooperation should be considered prior to and at the outset of an SEC investigation. Keep in mind that collaboration is a key component of successful cooperation. Current SEC leadership seems committed to rewarding cooperation.
- Review and update policies related to shadow trading and educate employees on these policies.
- Be aware of the SEC's focus on cryptocurrency as it continues to monitor this space.
- Pay special attention to gatekeeper responsibilities as the SEC continues to direct enforcement resources to this area.
- Reevaluate policies and disclosures related to AI and its associated risks.
- Tailor cyber procedures to fit each unique business model and update regularly.

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