Blogs

The air of uncertainty was palpable as current and former members of the U.S. Securities and Exchange Commission's (SEC) Division of Enforcement spoke at the Securities Regulation Institute's 44th Annual Conference in Coronado, California earlier this week.

Important questions went largely unanswered about the impact of the recent resignations of both SEC Chair Mary Jo White and Enforcement Director Andrew J. Ceresney, and the future direction of the enforcement program under the new presidential administration and proposed SEC Chair Jay Clayton. SEC Enforcement staff in attendance steered clear of prognostications, and instead used the conference as an opportunity to reiterate the agency's ongoing enforcement initiatives and successes from the past year. Former SEC Chair White, fresh from her departure just days earlier, provided the conference's keynote address. White asserted that vigorous securities enforcement typically is supported regardless of the controlling political party but, at the same time, she appeared to lament the likely future dismantling of aspects of the Dodd-Frank Act that the Commission and its staff worked so hard to implement. "The uncertainty around the future of the Dodd-Frank Act, or at least some parts of it, will likely slow the agency's progress until there is some greater clarity and perhaps a full Commission," White said, referring to the fact that with her resignation just two of the five Commissioner spots remain filled. In fact, even before the election and White's resignation, the Commission had open spots, which slows both rulemaking and decisions regarding enforcement actions. ***Cybersecurity*** Senior members of the SEC staff from Washington, D.C. and California spoke about current enforcement priorities. According to Stephanie Avakian, Acting Director of Enforcement, securities issues related to cybersecurity are an ongoing concern, as reflected in recent enforcement actions involving insider trading based on stolen information, as well as actions against regulated broker-dealer and investment advisor entities for failing to protect data. Avakian emphasized that public companies who have suffered data breaches should expect to face questions from the Enforcement staff, including those focusing on materiality and timing of the data breach and disclosure issues. ***Silicon Valley*** Jina L. Choi, Regional Director of the SEC's San Francisco office (which includes Silicon Valley in its jurisdiction), stated that financial fraud and disclosure investigations are a focus of that office, "especially in the pre-IPO space" where valuation continues to be an issue. She noted that of particular concern are advisors and other persons associated with private company capital raising, including those acting as unregistered brokers in connection with the sale of pre-IPO shares and related derivatives. One senses that enforcement actions on this topic are forthcoming. ***EB-5 Visa Programs*** The enforcement focus of the SEC's Los Angeles office differs. As Regional Director Michele Wein Lanye explained, that office continues to focus on fraud related to the EB-5 visa programs. California has attracted more EB-5 investment than any other state, and Wein noted that retirees in particular continue to be victimized. Her office is paying particular attention to immigration attorneys and others who may be acting as unregistered brokers in facilitating the programs. ***Investment Advisors*** Wein also noted that Los Angeles has seen an upswing in enforcement investigations being referred from its compliance examination program. The SEC's Office of Compliance has become less centralized with regions like Los Angeles taking over responsibility for examining broker-dealers and investment advisors. She noted that FINRA is taking the lead on a large percentage of the broker-dealer exams, which gives the SEC more resources to focus on investment advisors, which are not regulated by FINRA. ***Whistleblower Program*** Finally, Wein noted that the SEC's Whistleblower Program has been "transformative" and that 2016 was an "extremely successful, banner year." In fact, whistleblower reports *increased by 40%* in 2016. In total, the SEC now has paid out over $149 million in rewards to 41 whistleblowers. There is a long pipeline of enforcement actions to come with approximately 800 investigations stemming from complaints "being tracked by the Office of Whistleblower." ***Industry Perspective*** During the conference, defense lawyers expressed frustration with some aspects of the SEC's enforcement program, asserting that--at times--the staff presses forward with arguably weak cases against individuals and small companies that cannot afford to defend themselves. Further, a panel of former SEC enforcement lawyers (now in private practice) suggested that the SEC appears to be backsliding on its policy to encourage and reward cooperation and self-reporting. As a result, their consensus was that now they may be *less likely* to recommend that clients self-report errors. There is no doubt the SEC has been very busy on the enforcement side but important questions remain about the impact of the recent political shift and the filling of several high-level vacancies.

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