

SEC Commissioners Emphasize Focus on Individuals, Including Lawyers, in Enforcement Cases, and Brings an Auditor Independence Action Against an Audit Partner

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According to a recent [speech](#) by Chair White, one of the key decision points in nearly every enforcement action is who will be charged as a defendant. She disputed the notion that the SEC fails to charge individuals enough, since a recent internal analysis by the SEC staff showed that individuals were charged in 83% of SEC actions since the 2011 fiscal year.

She indicated that one new approach will be to start using Section 20(b) of the Exchange Act, which imposes primary liability on a person who does anything “by means of any other person” that would be unlawful for that person to do on his or her own. It could be used to reach those who have participated in disseminating false or misleading information, but who were not the “makers” of the statement. The SEC views the provision as being more potent, given that it is a form of primary rather than secondary liability, and may be available whenever aiding or abetting or controlling person theories are not because there is no underlying violation by someone else.

Commissioner Kara Stein echoed the theme of focusing on individuals, and singled out lawyers as gatekeepers, in her [speech](#). She wondered why lawyers are “one gatekeeper that [is] often absent” from the enforcement cases reviewed by the Commissioners, and questioned whether the SEC is “treating lawyers differently from other gatekeepers, such as accountants.” One of her recommendations is to consider new forms of attestations (“nothing focuses the mind like signing your name”), including one for lawyers on the accuracy of issuer disclosures.

Interestingly, the SEC just settled an action against the former chief risk officer and a partner at Deloitte, who acted as an advisory partner on an audit engagement for a casino gaming issuer. During the audit period, he sought and received casino markers from a casino of the issuer, which the SEC viewed to be prohibited “loans” under Regulation S-X that caused violations of auditor independence. He used the markers as gaming chips drawn against a line of credit at the casino that exceeded \$100,000. Deloitte was not aware of his activities. As a result of his actions, he caused the firm to violate PCAOB and SEC rules, and also caused the issuer to violate the Exchange Act.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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