

White Collar Update: SEC Division of Enforcement Co-Directors Stephanie Avakian and Steven Peikin Provide Remarks on Enforcement Division's Initiatives and Priorities

October 30, 2017

On October 26, 2017, Stephanie Avakian and Steven Peikin, Co-Directors of the U.S. Securities and Exchange Commission's Division of Enforcement, provided remarks at the 2017 Securities Enforcement Forum regarding the Enforcement Division's new initiatives and priorities.

Ms. Avakian, during the Forum's keynote address, discussed the recently-announced Retail Strategy Task Force and Cyber Unit, which she explained would allow the Commission to focus its resources on two of its key priorities. Ms. Avakian, however, was careful to make clear that despite these new areas of focus, the SEC would not allocate fewer resources to "financial fraud or policing Wall Street." In addition, during the Forum's "Director's Panel," Mr. Peikin suggested that rather than the wide sweeps that have been a hallmark of the "broken windows" approach to enforcement that was a priority during Mary Jo White's tenure as SEC Chair, resource constraints may cause the SEC to seek to achieve the same objectives with fewer cases.

Ms. Avakian's Remarks

During her remarks, Ms. Avakian explained that the Enforcement Division's priorities "do not really change over time," and that the Division will continue to focus on retail investors, cyber-related issues, "issues raised by the conduct of investment advisers, broker-dealers, and other registrants, . . . financial fraud and disclosure issues involving public companies, and . . . insider trading." Ms. Avakian stated, however, that there was more that the Enforcement Division could do to "align [its] resources with two of [its] key priorities – specifically, retail and cyber." To that end, the Commission recently announced the Retail Strategy Task Force and a new Cyber Unit.

Ms. Avakian explained that the Retail Strategy Task Force will use data analytics and technology to look specifically for "incidents of widespread misconduct targeting retail investors." According to Ms. Avakian, "[t]he Task Force will work with others in Enforcement . . . as well as with others in the Agency . . . to consider ways to apply new tools and technologies, like text analytics and machine learning, to the vast amounts of trade and other data" the Commission receives each year. She further explained that the Task Force will work with the Office of Compliance, Inspections and Examinations, as well as other investigative staff, but will not "generally be responsible for conducting investigations."

Ms. Avakian identified the following specific examples of problems the Enforcement Division has observed with respect to retail investors:

- "Investment professionals steering customers to mutual fund share classes with higher fees, when lower-fee share classes of the same fund are available."
- "Abuses in wrap-fee accounts, including failing to disclose the additional costs of 'trading away' or trading through unaffiliated brokers, and purchasing alternative products that generate additional fees."
- "Investors buying and holding products like inverse exchange-traded funds (ETFs) for long-term investment."

- “Problems in the sale of structured products to retail investors, including a failure to fully and clearly disclose fees, mark-ups, and other factors that can negatively impact returns.”
- “And, abusive practices like churning and excessive trading that generate large commissions at the expense of the investor.”

Ms. Avakian explained that the Task Force will also “focus on investor outreach, converting what they learn about problematic conduct into direct messaging to investors.” Ms. Avakian was careful to make clear that the Enforcement Division’s “enhanced retail focus” does not indicate that it will allocate “fewer resources to financial fraud or policing Wall Street.” “The premise that there is trade-off between ‘Wall Street’ and ‘Main Street’ enforcement is a false one,” she explained.

With respect to the Cyber Unit, Ms. Avakian noted that it is the Commission’s “first new specialized unit” since 2010 and that it was created because of the increasing frequency of cyber-related misconduct in the securities markets, which come from “foreign and domestic hackers, traders and others who traffic in stolen market-moving information, prospective market manipulators, state-sponsored actors, and others.” Ms. Avakian stated that the Cyber Unit will focus on cases in which cyber-misconduct is used to gain an unlawful market advantage, including:

- “Hacking to access material, nonpublic information in order to trade in advance of some announcement or event, or to manipulate the market for a particular security or group of securities.”
- “Account intrusions in order to conduct manipulative trading using hacked brokerage accounts.”
- And “[d]isseminating false information through electronic publication, such as SEC EDGAR filings and social media, in order to manipulate stock prices.”

Ms. Avakian noted that the Cyber Unit will also focus on cases “involving failures by registered entities to take appropriate steps to safeguard information or ensure system integrity” and “cases where there may be a cyber-related disclosure failure by a public company.”

Finally, Ms. Avakian explained that another Cyber Unit focus will be blockchain technology, echoing some of the themes raised in the SEC’s July 25, 2017 investigative report addressing digital assets sold by virtual organizations. Ms. Avakian stated that offers and sales of digital assets are subject to the requirements of the federal securities laws, “which can include the registration of securities offerings,” and that blockchain technology “can be an attractive vehicle for fraudulent conduct.” The Cyber Unit will consider these issues to “ensure continued focus on protecting both investors and market integrity in this space.”

Mr. Peikin’s Remarks

During a panel discussion with former SEC Directors of Enforcement following Ms. Avakian’s remarks, Mr. Peikin echoed Ms. Avakian’s statements regarding the Enforcement Division’s focus on protecting retail investors. In response to a comment from former Director of Enforcement Andrew Ceresney regarding the use of wide enforcement sweeps to uncover pervasive rule violations as part of a “broken windows” strategy intended to police relatively minor infractions of the securities laws, Mr. Peikin suggested that the Division of Enforcement may be conducting fewer such sweeps due to limited resources and will focus instead on bringing select cases that send a broader message. Continuing a trend begun under Ms. White and Mr. Ceresney’s tenure, Mr. Peikin also indicated that the Commission may reduce its emphasis on the importance of companies’ admitting wrongdoing as a condition of settling certain cases with the SEC. He noted that, when resolutions with the Commission include charges, penalties, and sanctions, admissions may not make an incremental difference in making clear that the underlying conduct is unlawful. Finally, Mr. Peikin noted that he and Ms. Avakian intend to be accessible to defense counsel during the course of Enforcement Division investigations, with an aim to ensuring a fair process.

Potential Impact on the SEC's Enforcement Efforts

Ms. Avakian and Mr. Peikin's remarks signal a potential shift away from former SEC Chair Mary Jo White's signature enforcement policy and a focus on new areas for investigation and enforcement. Ms. White championed a prosecutorial "broken windows" approach to policing Wall Street, pursuing even minor violations of the securities laws. In 2013, she explained the law enforcement theory underpinning her "broken windows" strategy: "when a window is broken and someone fixes it – it is a sign that disorder will not be tolerated. But, when a broken window is not fixed, it is a signal that no one cares, and so breaking more windows costs nothing." Ms. White stated that "the same theory can be applied to our securities markets – minor violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines." During Ms. White's tenure, enforcement activity rose at a strong pace year over year: the Enforcement Division brought 676 enforcement actions in 2013, 755 in 2014, 807 in 2015, and 868 in 2016.

While the Enforcement Division will no doubt continue bringing fraud-related and other cases involving major violations at a strong pace under Chair Jay Clayton's leadership, the renewed focus on harm to retail investors and a potential rollback of the "broken windows" approach may very well result in fewer enforcement actions involving smaller infractions – including possibly compliance and controls-related enforcement actions. As with most things, the devil may be in the details, and in how the Enforcement Division ultimately draws the line between significant cases and mere "broken windows."

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

New York

Martine M. Beamon	212 450 4262	martine.beamon@davispolk.com
Angela T. Burgess	212 450 4885	angela.burgess@davispolk.com
Avi Gesser	212 450 4181	avi.gesser@davispolk.com
Denis J. McInerney	212 450 4477	denis.mcinerney@davispolk.com

Northern California

Neal A. Potischman	650 752 2021	neal.potischman@davispolk.com
---------------------------	---------------------	--

Washington DC

Neil H. MacBride	202 962 7030	neil.macbride@davispolk.com
Paul J. Nathanson	202 962 7055	paul.nathanson@davispolk.com
Linda Chatman Thomsen	202 962 7125	linda.thomsen@davispolk.com
Kenneth L. Wainstein	202 962 7141	ken.wainstein@davispolk.com

Hong Kong

Patrick S. Sinclair	+852 2533 3305	patrick.sinclair@davispolk.com
----------------------------	-----------------------	--

© 2017 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy policy](#) for further details