

Securities Investigations and Enforcement Newsletter – July 2021

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New SEC Leadership

GURBIR GREWAL NAMED AS NEW DIRECTOR OF SEC ENFORCEMENT DIVISION

By [Jay Dubow](#), [Ghillaine Reid](#), and Meredith Sherman

The Securities and Exchange Commission (SEC or Commission) announced that New Jersey Attorney General Gurbir Grewal will become the next director of its Enforcement Division (Division), after resigning his New Jersey's attorney general position on July 26. Grewal's appointment follows President Biden's April confirmation of Gary Gensler as the new SEC chairman.

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Whistleblower Complaints

COMPANIES SHOULD EXERCISE CAUTION WHEN ADDRESSING ANONYMOUS WHISTLEBLOWER COMPLAINTS

By [Jay Dubow](#), [Ghillaine Reid](#), and Meredith Sherman

Public companies should proceed with caution when receiving and investigating anonymous whistleblower complaints. Several public companies recently received whistleblower complaints from an anonymous source – each with identical or similar wording – purporting to concern alleged insider trading by employees at the recipient company. These complaints, which have been submitted to the third-party ethics or whistleblower e-mail hotlines at a number of public companies, allege that unidentified company employees made statements suggesting that the employees traded in the company's stock based on non-public information.

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Regulatory Actions

RECENT DEVELOPMENTS IN AUDITING COULD CREATE TENSIONS, LEADING TO MORE REGULATORY ACTIONS

By [Jay Dubow](#), Miranda Hooker, [Ghillaine Reid](#), and Thomas Cordova

Public companies should prepare for a more strenuous auditing process, and the increased likelihood that the information that they share with their auditors could be compelled by the Securities and Exchange Commission (SEC) during an investigation. This new dynamic has resulted from two recent developments: (1) the SEC's decision to revamp their Public Company Accounting Oversight Board (PCAOB), which will likely increase the board's enforcement of audits of public companies, and (2) a recent decision of the U.S. District Court for the District of Columbia in *SEC v. RPM International, Inc.*, (*SEC v. RPM*) in which the court held that RPM had waived its attorney-client privilege by sharing certain information about an internal investigation with its auditors.

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SEC'S Focus on COVID-19 Fraud

SEC CASES OFFER INSIGHT INTO ITS APPROACH TO ALLEGED COVID-19 SECURITIES FRAUD

By [Jay Dubow](#), [Ghillaine Reid](#), and [Mary Grace Metcalfe](#)

A remote status conference was held June 28 for *United States v. Mark Schena*, currently pending in the U.S. District Court for the Northern District of California. In the recently unsealed superseding indictment, the SEC alleges that Mr. Schena, who serves as the president and chief science officer of biotechnology company Arrayit Corporation (Arrayit), made false and misleading statements regarding a COVID-19 antibody test being developed by the company in early 2020. Mr. Schena is charged with health care fraud, securities fraud, offering illegal kickbacks, as well as conspiracy to commit health care fraud and pay illegal kickbacks.

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SEC's Rulemaking Agenda

GENSLER'S SEC AGENDA: COMMITMENT TO ESG AND INCREASED DISCLOSURES

By [Jay Dubow](#), [Ghillaine Reid](#), [Casselle Smith](#), and Brielle Landis

On June 11, the Biden administration's Office of Information and Regulatory Affairs (OIRA) released the Securities and Exchange Commission's (SEC or Commission) rulemaking agenda (Rulemaking Agenda) as part of the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions. The Rulemaking Agenda outlines a panoply of items that, taken together, summarize the SEC's plan for near- and long-term regulatory action for the upcoming year. This is, of course, not the industry's first glimpse into what we can expect from the SEC's new leadership. Although he was confirmed to the role of SEC chair only two months ago, Gary Gensler has been outspoken about his goals for the SEC, and unflagging in his intent to usher in an "active policy agenda" and "ensure ... that the rules are enforced aggressively and consistently."^[1] Recently, in his remarks at the May 2021 *FINRA Annual Conference*, Gensler highlighted his focus on issues, such as climate risk disclosure, market transparency, gamification, and equity in market structure.

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SEC Enforcement

SOLARWINDS CYBERATTACK GENERATES RECENT WIDESPREAD SEC ENFORCEMENT REQUESTS

By [Jay Dubow](#), [Ghillaine Reid](#), and [Mary Weeks](#)

The SEC's Division of Enforcement recently issued voluntary information requests to several public companies, inquiring about the details of any impact arising from the widely publicized December 2020 SolarWinds cyberattack. These requests — sent to several public companies that had used SolarWinds' software, as well as funds, investment advisors, and other entities — were delivered via the SEC's mail service for delivery of encrypted messages in connection with confidential investigations. The requests, identified initially by some companies as spam or phishing emails, now in large part have been confirmed as legitimate.

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U.S. Courts of Appeal

IT'S OFFICIAL: CIRCUITS ARE SPLIT ON DOMESTIC TRANSACTION TEST

By [Jay Dubow](#), [Ghillaine Reid](#), and [Lauren Geiser](#)

The U.S. Courts of Appeal for the First and Second Circuits have split on the issue of whether a plaintiff must satisfy the Second Circuit's "predominantly foreign" test (set forth in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*) to demonstrate that a transaction is "domestic" under the U.S. Supreme Court's "domestic transactions in other securities" [second] prong from *Morrison v. National Australia Bank Ltd.* — even if this plaintiff has already satisfied the traditional "irrevocable liability" test.

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Data Analytics

SEC COMMENTARY HIGHLIGHTS INCREASED FOCUS ON DATA ANALYTICS IN IDENTIFYING POTENTIAL SECURITIES LAW VIOLATIONS

By [Jay Dubow](#), [Ghillaine Reid](#), [Mary Weeks](#), and [Sam Hatcher](#)

Recent commentary by Diana Tani, an assistant regional director with the SEC, at the Securities Enforcement West web conference emphasized the agency's focus on data-driven investigations. Two areas targeted for recent enforcement are manipulations to achieve earnings per share (EPS) estimates and undisclosed executive compensation, especially as related to executives' usage of corporate aircraft.

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