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IN THIS ISSUE

ARTICLES

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This Report is published quarterly by Sidley's Securities Enforcement and Regulatory practice. It is designed to provide actionable information and insights on key securities enforcement and regulatory developments to help busy legal and compliance professionals be more effective in their roles.

POST-PANDEMIC PRIORITIES FOR SEC BROKER-DEALER ENFORCEMENT

by Hardy Callcott

The SEC's enforcement priorities under Chairman Jay Clayton, prior to the COVID-19 pandemic, were easy to summarize. Unlike many agencies, there has been much more continuity than change at the SEC: All the major program areas that have historically been a focus of SEC enforcement (insider trading, market manipulation, complex products, FCPA, etc.) have continued to receive substantial enforcement resources in the Clayton era. To the extent there was a change, Chairman Clayton focused extra attention on frauds affecting "Main Street investors," especially seniors and other vulnerable investors. In the broker-dealer area, this resulted in the SEC's bringing some cases involving fraud and embezzlement by registered representatives that it might have delegated to FINRA in the past. Perhaps most notable in its FY 2019 cases, the SEC brought more than 100 cases against investment advisers (many of which were dual-registrant broker-dealers as well) as part of its mutual fund Share Class Selection Disclosure Initiative involving alleged failures to disclose conflicts of interest involving mutual fund Rule 12b-1 fees.

But a financial and economic crisis tends to refocus any enforcement program. We don't know all of the SEC's new enforcement priorities for broker-dealers, but some are already apparent.

- **Frauds relating to COVID-19.** The SEC already has been active in pursuing cases involving false claims about COVID-19 vaccines and treatments and related products such as personal protective equipment or ventilators. Despite the challenges of stay-at-home orders, the SEC has brought such cases quickly and has aggressively sought trading suspensions against companies believed to have made such misstatements. In the broker-dealer world, expect this priority to translate into scrutiny of firms that failed to detect pump-and-dump schemes by their customers in these securities.
- **MNPI.** The SEC allowed public companies to delay their SEC periodic filings due to the pandemic, but it has warned about an increase in the possibility that material nonpublic information (MNPI) would leak as a result. Even for companies that kept their filings current, many companies declined to release guidance about future earnings (despite an SEC plea that companies give such guidance)—again creating an increase in potential MNPI misuse. Expect the SEC to ramp up its review of trading while in possession of MNPI by broker-dealers themselves and also of broker-dealers' efforts to detect and report suspicious trading activity by their customers.

- **Complex products.** During the spring's financial turmoil, a number of complex ETFs and ETNs, many listed on exchanges and widely available to retail investors, performed in ways investors did not expect. These included oil and other commodity-linked ETFs and ETNs, volatility-linked ETFs and ETNs, and ETFs and ETNs focused on narrow and volatile market sectors such as airlines. Expect the SEC to review broker-dealers that recommended, structured, or distributed these securities. Expect similar scrutiny of the highly publicized trading in the (likely worthless) equity securities of bankrupt companies.
- **Municipal securities.** The pandemic has had a devastating effect on many municipal budgets and increased the potential for municipal bond defaults. The SEC has warned about the need for current and accurate continuing event disclosures by municipal issuers. But because the SEC has only limited jurisdiction over municipal issuers themselves, expect the SEC to focus on broker-dealers that underwrite, trade, or recommend distressed municipal bonds.
- **U.S.-listed foreign securities.** The SEC similarly has warned about the risks posed by securities listed in the U.S. of companies located in foreign jurisdictions that do not cooperate with the U.S. audit and securities enforcement processes (notably but not exclusively including China). Again, expect SEC scrutiny of broker-dealers that underwrite, trade, or recommend such securities to clients, especially to retail clients.

Broker-dealer legal, compliance, anti-money laundering and risk-management staff should anticipate SEC (and FINRA) inquiries in all of these areas. It is always a good idea to consider new oversight and surveillance efforts directed at new SEC enforcement priorities.

Hardy Callcott concentrates on enforcement defense and regulatory counseling and was ranked by Chambers USA in Band 1 for both Broker Dealer (Compliance) and Broker Dealer (Enforcement) in 2020.

UK SECURITIES REGULATION *An Interview with Sara George*

Sara George is a partner in Sidley's London office who focuses on UK and international regulatory and criminal investigations. She is a former prosecutor for the Financial Services Authority (FSA) and brought the first criminal prosecution by the FSA against a director for misleading the market, the first Listing Rule contravention case, and numerous market abuse cases.

Q: How is the UK dealing with the impact of the COVID-19 pandemic on its financial services sector?

Unlike in 2008, the UK government is embracing the financial services sector as the means to alleviate the consequences of the pandemic by offering new loans and repayment and interest holidays on existing loans. Financial stability and the maintenance of electronic banking and payment services have been a priority. Financial services sector workers were designated as key workers.

Q: Have there been any changes in regulatory enforcement?

Routine supervisory work has largely ceased. Instead, there has been targeted action towards activities seen as harming consumers, including high-cost loans. There has also been a wholly new innovation: regulators pursuing expedited public interest litigation over whether insurance contracts exclude pandemic coverage. These cases have involved small businesses that lack the resources to fund the litigation and were at risk of failing before the issue was determined by the courts.

ENFORCEMENT NEWS

4/6–Broker-dealer agrees to pay $3.2 million to settle SEC charges of providing deficient blue sheet data. *In Matter of Cantor Fitzgerald*

4/17–SEC orders three advisers to pay a total of $843,000 in separate Share Class Selection Disclosure Initiative cases. *In Matters of Cozad Asset Mgmt., Eagle Strategies, & Merrill Lynch*

4/17–Broker-dealer agrees to pay $300,000 fine to settle FINRA allegations of submitting erroneous or inaccurate reports to the Order Audit Trail System. *Morgan Stanley & Co.*

4/22–Private equity fund adviser agrees to pay $1.9 million to SEC to settle allegations of failing to fully disclose or obtain consent to charging portfolio companies for services. *In Matter of Monomoy Capital Management*

Q: What changes do you see in the future?

The pressure on the economy has raised regulatory concerns involving the protection and segregation of client assets and reliance upon payment service providers. When steps were taken to freeze the assets of Wirecard, it became apparent that a high proportion of vulnerable adults in the UK relied entirely upon prepaid charge cards linked to Wirecard to obtain food and medicines. After the assets were frozen, these individuals were left without resources. The financial services firms should expect increased regulatory attention to these areas.

The UK financial services sector is mostly working from home where there is limited ability for firms to supervise their workers or to police information barriers. There have been repeated regulatory warnings as to the consequences for those who take advantage of material nonpublic information or fail to make proper disclosures and compromise the integrity of the financial markets.

Q: What are the key differences in the approach of the UK regulators compared to US regulators?

The scope and process for negotiation of a finding and sanction is generally more circumscribed in the UK. The FCA is the conduct regulator the financial services sector in the UK. Decisions on the outcome of a case are not made by the FCA's investigation team but by a Regulatory Decisions Committee of which only the Chairman is an officer of the FCA. The panel members are practitioners and independent of the FCA, although they make decisions on its behalf. It is not uncommon for the committee to disagree with the FCA's staff investigators.

There is no longer a binary choice for firms and individuals between contesting or settling a case with the risk of losing the discount available for early settlement. Firms and individuals subject to an enforcement process can partly contest the proposed action against them without losing the benefit of the discount of up to 30 percent of the financial penalty for early settlement.

The subject of the enforcement action can agree on some issues of fact and whether the facts amount to a breach but contest other matters such as the appropriate sanction whilst still retaining the ability to retain the benefit of a discount on a sliding scale for early settlement depending on precisely what remains contested.

TESTIMONY IN THE TIME OF COVID-19

by Timothy Nagy

Imagine you receive a subpoena from the SEC or a request from FINRA or the NYSE requiring your client to give sworn, on-the-record testimony in the near future. In ordinary times, the mechanics for preparing your witness and defending his or her testimony are fairly straightforward. First, you meet in person with your client to prepare and go over binders of paper documents. Then, you and your client meet in person, often in a small conference room, with the examiners, regulators' lawyers, and a court reporter for the testimony. Everyone breathes the same air and touches the same documents for hours at a time.

How is this supposed to work during the current pandemic? Many lawyers consider being physically present during testimony to be critical to effective representation. But social distancing, stay-at-home orders, travel restrictions, and company policies may make the usual in-person meetings extremely difficult, if not impossible. Health concerns may make them imprudent.

At the outset of the pandemic, regulators were often willing to postpone investigative testimony or accept alternatives such as written answers to interrogatories or voluntary

ENFORCEMENT NEWS

4/24 – Brokerage firm settles share class selection charges with SEC for $3.9 million. *In Matter of RBC Capital Markets*

4/28 – Mutual fund adviser agrees to pay $500,000 to settle SEC charges of overvaluing odd-lot bond positions and overstating fund performance. *In Matter of Semper Capital Management*

4/28 – SEC sues microcap issuer and CEO for allegedly false press releases claiming the company could acquire and supply large quantities of N95 masks. *SEC v. Praxsyn Corp.*

4/30 – SEC files settled charges against private fund adviser and principal for alleged failures to comply with concentration and risk control disclosures and imposes $3.2 million in disgorgement and penalties. *In Matter of Everest Capital*

telephone interviews. As the new normal has taken shape, however, securities regulators now routinely insist that sworn testimony proceed by video conference. This stance is supported by a number of recent decisions ordering depositions to take place by video in civil litigation. *See, e.g., Jae Props., Inc. v. Amtax Holdings,* No. 19-2075, U.S. Dist. LEXIS 83418 (S.D. Cal. May 12, 2020).

Testimony by video conference—with the regulatory staff, the court reporter, the witness, and defense counsel all potentially in different locations—presents a host of challenges. The following are some best practices based on our recent experience.

- **The Platform.** The regulator will normally propose a particular platform such as WebEx, Cisco, or Zoom. Ask the regulator to provide a test run in advance, including a demonstration of how documents will be handled. Unless requested by the regulator, you should confirm that the video conference will not be recorded.

  Establishing a stable and reliable connection can be challenging from some locations. Consider whether it would be practical and safe for you or your client to participate from the office, which will often have better technology and access to IT support.
- **Video Etiquette.** Participants other than the examiner and the witness should mute their audio to avoid background noises and feedback. Defense counsel must remain vigilant and promptly "unmute" when making an objection or requesting a clarification. The regulatory staff should designate a primary questioner to avoid having multiple questioners speaking over one another.
- **The Oath.** The oath will be administered by video but will have the same effect as if administered in person. In some instances, regulatory staff has required confirmation regarding the administration of the oath in writing or by email.
- **Security.** The witness and counsel will be required to represent that (i) they will not communicate with each other electronically, such as through chat or email, during the testimony, and (ii) no undisclosed persons are in the room with them. As with any testimony, witness should not take notes or have materials in front of them, nor should they take the opportunity of being in front of a computer to look up information on the internet.
- **Exhibits.** The witness should be prepared to view exhibits on a monitor with the staff maintaining control and scrolling through pages at the witness's direction. This can be difficult, particularly if it involves a lengthy document or simultaneous comparison of multiple exhibits. It is reasonable to request that the regulator share copies of any proposed exhibits with counsel in advance.
- **Breaks.** As with any testimony, there will be periodic breaks or consultations. The witness certainly has the same right to consult with counsel at any point during the testimony, and it is critical to protect the confidentiality of those discussions. During breaks, it is recommended that the witness and counsel disconnect their audio from the proceeding and/or place their audio on mute. Where possible, the witness and counsel should physically leave the room where the video is set up and speak by telephone. After any break or consultation, the witness and counsel should announce their return.

In many ways, video testimony is challenging for counsel. Counsel loses the opportunity to "read the room," including assessing the body language of the participants. Some witnesses may lose the comfort and confidence that comes with having counsel at their side. Despite these challenges, however, video testimony is likely here to stay, even after the COVID-19 pandemic is resolved.

Timothy Nagy is a counsel in the Washington, D.C. office and focuses on advising broker-dealers and other regulated entities in compliance and enforcement matters.

ENFORCEMENT NEWS

5/6 – Broker-dealer agrees to pay $5 million penalty to SECfor allegedly misrepresenting order routing practices. *In Matter of Bloomberg Tradebook*

5/12 – Broker-dealer agrees to pay $5 million to settle SEC charges relating to disclosures of trade execution services and transaction costs in retail wrap fee programs. *In Matter of Morgan Stanley*

5/13 – Activist investor agrees to pay $290,000 to settle SEC charges for failing to disclose stake in a China-based biopharmaceutical company. *In Matter of 1Globe Capital and Jiaqiang "Chiang" Li*

5/15 – Credit rating agency agrees to pay $3.5 million to settle SEC charges for conflicts of interest violations. *In Matter of Morningstar Credit Ratings*

REASONABLY SUPERVISING A REMOTE WORKFORCE

by John Sakhleh, Robert Buhlman, and Christopher Mills

In response to the COVID-19 pandemic, many broker-dealers and investment advisers have transitioned to remote-work arrangements under which personnel work from their homes rather than firm offices.[1] In the current circumstances, remote work has obvious benefits. For example, remote work can facilitate social distancing and provide flexibility to employees with children who can no longer rely on their primary means of childcare. At the same time, a sudden shift to larger than normal remote work arrangements may present additional challenges for systems, policies, and procedures that were designed with a focus on conducting business in a traditional office work environment. One area that can present challenges is supervising personnel who no longer work in centralized locations but instead are now scattered throughout multiple jurisdictions.

The requirement that broker-dealers and investment advisers have policies and procedures reasonably designed to achieve compliance with applicable laws and regulations remains unchanged, even during the current pandemic. What is reasonable, however, depends on the particular facts and circumstances of a firm's business, including the environment in which it operates. That environment surely has changed due to COVID-19. Due to the changed circumstances caused by COVID-19 and government orders intended to address its spread, broker-dealers and investment advisers should carefully reassess their policies and procedures to confirm that they are appropriately supervising employees who are working remotely.

Depending on a firm's lines of business, supervisory systems that were reasonably designed to supervise registered representatives in nonremote locations during normal circumstances may need to be modified while employees are working remotely. In assessing whether modifications are necessary, firms should be mindful that it may be appropriate to supervise different types of employees differently. For example, it may be appropriate to use policies and procedures to supervise traders or portfolio managers who are working remotely that differ from those used to supervise research analysts or back-office personnel. For employees who are accustomed to working in highly collaborative work environments, separation may pose issues related to desk communication, order execution, and risk management. As a result, firms should review their supervisory procedures related to these areas and determine whether to implement alternative supervisory systems.

Firms should also consider whether their remote supervision procedures appropriately address concerns that may be more acute when employees are working remotely, such as those involving cybersecurity or the capture of communications or other records. To take one example, firms using video-conferencing platforms that also permit messaging should confirm that they are appropriately retaining and reviewing communications on those platforms that relate to the firm's business as such.

Additionally, firms should determine whether their supervisory systems appropriately account for areas that may present more regulatory or operational risk during this time. For example, firms that permit remote access to their systems should consider whether additional safeguards may be warranted, given the circumstances, to guard against cyber threats or to otherwise protect customer records and information. Similarly, remote work arrangements can increase the risk that third parties (including people living in the remote worker's home) may become aware of proprietary nonpublic information. As a result, firms should evaluate what employees are expected to do to make sure their home work environments are sufficiently private and secure.

The current environment also could present a heightened risk of misconduct or inadvertent operational failures—particularly where clients or customers are engaged in trading activity

1 See John Sakhleh & Chris Mills, *Business Continuity Planning: Preparing for Pandemics and Other Significant Business Disruptions,* Thomson Reuters Westlaw (June 22, 2020), https://www.sidley.com/-/media/publications/westlaw_business-continuity-planning.pdf?la=en.

ENFORCEMENT NEWS

5/18 – Introducing broker-dealer agrees to pay $634,000 fine and restitution to settle FINRA charges of failing to supervise sales of nontraditional ETFs. *SunTrust Investment Services*

5/26 – Private equity adviser settles SEC charges of failing to maintain adequate policies to prevent misuse of MNPI for $1 million. *In Matter of Ares Management*

5/27 – Broker-dealer agrees to pay $3.6 million to settle FINRA supervision charges relating to rollovers of unit investment trusts. *Stifel, Nicolaus & Co.*

5/28 – SEC brings settled charges against blockchain services company for alleged unregistered initial coin offering and orders payment of $29.3 million in disgorgement, interest, and penalties. *In Matter of BitClave*

ENFORCEMENT NEWS

6/4–Issuer agrees with SEC to pay $900,000 for alleged failures to disclose executive perquisites. *In Matter of Argo Group Int'l Holdings*

6/4–FINRA orders brokerage firm to pay $7.2 million in restitution for claims related to charges and fees for mutual fund transactions. *Merrill Lynch, Pierce, Fenner & Smith*

6/17–Insurance company and former executive settle SEC charges of failing to adequately disclose how the company estimated its insurance losses and reserves for $10.5 million. *SEC v. AmTrust Financial Services*

6/24–Broker-dealer agrees with SEC and FINRA to pay $3.1 million to settle blue sheet charges. *In Matter of SG Americas Securities*

or transfers that they may not make in normal market conditions. As such, firms should consider whether additional reviews or safeguards should be implemented regarding, among other things, electronic communications, unusual trading activity, or transfers of funds or securities. In addition, during this time, customer complaints may be high, and firms should review their supervisory process for reviewing the issues and nature of customer complaints received and how such complaints are being addressed.

Remote work arrangements also implicate FINRA requirements for identifying branch offices or nonbranch office locations and conducting onsite inspections of these locations. For relocations or remote work arrangements due to COVID-19, FINRA has provided temporary relief from the requirements to update Forms BR and Forms U4. Similarly, FINRA has provided for a temporary extension of time for broker-dealers to inspect certain office locations. The relief provided by FINRA remains subject to change, and broker-dealers should closely monitor developments in this area given the nuances in how any relief may apply.

John Sakhleh regularly advises broker-dealers, investment advisers, and fintech companies on supervisory, compliance, transactional/integration, and examinations/enforcement matters. Robert Buhlman is a leading adviser to the securities industry on registration, disclosure, and other regulatory issues. Christopher Mills is an associate who focuses on representing clients in SEC and FINRA examinations, investigations, and enforcement actions.

DISGORGEMENT AFTER *LIU v. SEC*

by Griffith Green and Alyssa Pompei

On June 22, 2020, the U.S. Supreme Court held in *Liu v. SEC* that the SEC may continue to obtain disgorgement in federal court enforcement actions as a form of "equitable relief" under Section 21(d)(5) of the Securities Exchange Act of 1934. Although the Court upheld the SEC's ability to seek disgorgement, the 8-1 decision also placed important limits on the permissible scope of disgorgement, including that disgorgement awards may not exceed "the gains made upon any business or investment, when both the receipts and payments are taken into account." Slip Op. at 18-19.

In reaching its decision, the Supreme Court looked to traditional equitable principles, under which courts "routinely deprived wrongdoers of their net profits from unlawful activity." *Id.* at 6. The Court endorsed this focus on "net profits," which reflected the "foundational principle" that it would be "inequitable that [a wrongdoer] should make a profit out of his own wrong" while also recognizing the "countervailing equitable principle" that a wrongdoer should not be "punished by paying more than a fair compensation to the person wronged." *Id.* at 6-7.

The Court emphasized that certain limits were necessary to avoid transforming disgorgement into a "penalty outside [courts'] equitable powers." *Id.* at 9. In particular, the Court held that "courts must deduct legitimate expenses before ordering disgorgement." *Id.* at 19. As the Court explained, "a rule to the contrary that 'make[s] no allowance for the cost and expense of conducting [a] business would be 'inconsistent with the ordinary principles and practice of courts of chancery.' " The Court specifically rejected the view of the lower courts that no expenses could be deducted because they had only furthered an "entirely fraudulent scheme." Instead, the Court admonished that expenses had to be examined to ascertain whether they were "legitimate" or were "merely wrongful gains 'under another name.' " *Id.*

Although it is clear after *Liu* that disgorgement must be based on net profits and that "legitimate" expenses must be deducted when calculating those profits, the Court offered little guidance on what expenses should be considered "legitimate." The issue will undoubtedly occupy litigants and courts for years to come. In the near term, however, firms faced with disgorgement demands from the SEC should carefully consider the types of expenses that could be claimed as "legitimate," including the following:

- **"No deduction" disgorgement.** The SEC occasionally has sought disgorgement of a defendant's total revenues, with no deductions, on the theory that where the entire enterprise was a fraud, all expenses were incurred in furtherance of the fraud and, therefore, could be ignored. For example, where an investment adviser obtained clients through serious misrepresentations, the SEC has sometimes demanded disgorgement of the entirety of the adviser's management fees. *Liu* appears to have rejected this approach, putting the focus on whether individual expenses—not the enterprise as a whole—was legitimate or not.
- **Taxes.** Prior to *Liu*, the SEC routinely took the position that taxes could not be deducted when calculating disgorgement. This often left defendants in the awkward position of having to disgorge pre-tax profits, including the portion of those profits they had already paid to the government in taxes. A 2017 Internal Revenue Service memorandum compounded the problem, finding that disgorgement payments themselves were not tax deductible, which foreclosed the prospect of a defendant's taking deductions to offset the taxes previously paid on the now-disgorged profits. *Liu* firmly puts taxes in play as a potential deduction from disgorgement calculations.
- **Illicit payments.** In FCPA cases, the cost of bribes and other illicit payments have not been allowed as deductions from the defendant's net profits. That treatment is consistent with traditional equitable principles and is likely unchanged by *Liu*.
- **Transaction fees, commission, and underwriting fees.** Liu provides strong arguments that fees paid to third parties in the normal course should be deducted from any disgorgement award. Under *Liu*'s logic, an issuer disgorging the net profits of a fraudulent offering would appear to be entitled to deduct the underwriting fees for the offering. An investment adviser disgorging management fees would appear to be similarly entitled to deduct the costs of managing client assets.

In short, although *Liu* upheld the SEC's ability to obtain disgorgement, it was only a partial win for the SEC and will likely force significant changes in how the SEC calculates and implements disgorgement. The open questions left by *Liu* provide opportunities for firms to argue for better disgorgement results than were available pre-*Liu*.

Griffith Green, a former clerk for Justice Antonin Scalia, regularly represents broker-dealers, financial services firms, hedge funds, and issuers in investigations by the SEC, FINRA, DOJ and state regulators. Alyssa Pompei is an associate in Sidley's Securities Enforcement and Regulatory group.

CURRENT RISKS FOR SENIOR INVESTORS

by Corin Swift and James Bowden, Jr.

As COVID-19 continues to affect the country, senior investors are particularly at risk of becoming targets of financial scams. For seniors, stay-at-home orders and social distancing can mean isolation from support systems and family. At the same time, senior investors who live on limited and fixed incomes are likely to receive direct assistance under the federal stimulus packages. This combination of factors puts seniors at heightened risk of being defrauded or exploited. Regulators and financial institutions have been focused on these risks for years, but the COVID-19 environment brings new urgency to efforts to protect senior investors.

A majority of states have adopted laws specifically designed to protect senior investors. These laws generally require financial institutions to report suspected financial abuse of senior investors to relevant authorities and delay disbursements of funds when fraud against a senior investor is suspected. Many of these laws are based on the North American Securities Administrators Association's Model Act to Protect Vulnerable Adults From Financial Exploitation (the Model Act), which has five main components:

ENFORCEMENT NEWS

6/25–Pharmaceutical company agrees to pay $112 million to settle FCPA charges with SEC. *In Matter of Novartis*

6/26–SEC settles pending case alleging unregistered offering of digital tokens, with defendants agreeing to disgorge $1.2 billion and pay $18.5 million penalty. *SEC v. Telegram Group and Ton Issuer*

6/29– Broker-dealer agrees to pay $250,000 to SEC to settle charges of loaning securities to a customer to settle purported "long" sales in violation of Reg. SHO. *In Matter of BNP Paribas Securities*

7/2—Pharmaceutical company agrees to pay $21 million to settle FCPA charges with SEC. *In Matter of Alexion Pharmaceuticals*

ENFORCEMENT NEWS

7/13—App developer agrees to pay $150,000 to settle SEC charges for selling unregistered security-based swaps. *In the Matter of Plutus Financial*

7/20—SEC and DOJ charge former registered representative/investment adviser with fraud for allegedly misappropriating over $2.5 million from customers. *SEC v. Carter*

7/20—SEC and DOJ file charges against tech start-up and CEO for alleged false statements about company's finances and sources of revenue. *SEC v. YouPlus, Inc.*

- **Mandatory reporting.** Prompt notification by covered individuals who reasonably suspect financial exploitation to adult protective services and state securities regulators.
- **Authorized disclosure.** Disclosure to a designated third-party contact, unless the third party is suspected of the financial exploitation.
- **Delayed disbursement.** Authority to delay disbursing funds, typically for up to 15 business days.
- **Immunity.** Protection from liability for individuals, broker-dealers, or investment advisers who act in good faith and with reasonable care in complying with the provisions of the act.
- **Document retention and sharing.** Requirement to provide requested records to adult protective services or law enforcement.

In 2017, FINRA enacted Rule 2165, which permits broker-dealers to put a temporary hold on disbursements of funds or securities from an account when there is reason to believe financial exploitation has or will occur. The firm must provide notice to the account holder and a trusted contact within two days after imposing the hold and must conduct an internal review. In tandem with enacting FINRA Rule 2165, FINRA amended Rule 4512 to require broker-dealers to ask their retail customers to provide the name and contact information for a "trusted contact person" the firm may contact in the event of possible financial exploitation or fraud. FINRA's rulemaking in this area complements the state legislative activity, although FINRA has a narrower jurisdiction (broker-dealers).

A third layer of protection for senior investors is the federal Senior Safe Act of 2018 (Senior Safe Act), which includes a provision extending civil and administrative immunity to covered individuals in the financial industry who report suspected financial exploitation. The Senior Safe Act encourages, but does not require, reporting of suspected exploitation of senior investors.

As financial firms focus on senior investors, it is important to understand the interplay of these regulatory regimes—particularly for firms operating in multiple states or covered businesses. Areas of focus should include:

- Identification of relevant lines of business subject to senior protection laws and regulations.
- Identification of "senior" investors, typically individuals aged 65 or older (although there can be variations and exceptions).
- Trusted contact identification practices.
- Internal written supervisory procedures addressing risks for senior investors.
- Internal and external training programs, including training on identifying warning signs of financial abuse, reporting requirements, and documentation.

The SEC, FINRA, and state regulators have long made the protection of senior investors an examination and enforcement priority. In the current environment—with its unique risks for senior investor—regulatory scrutiny can only increase. Financial institutions should prepare by reviewing and strengthening their policies and practices and by ensuring they are meeting regulators' expectations.

Corin Swift has extensive experience representing broker-dealers, investment advisers, and other financial institutions inboth internal and external investigations and enforcement proceedings.
James Bowden is an associate and a member of Sidley's Securities Enforcement and Regulatory practice.

ENFORCEMENT NEWS

7/20—Broker-dealer agrees to pay $10 million to settle SEC charges for violating rules giving priority to retail investors in municipal bond offering. *In Matter of UBS Financial Services*

7/28— Broker-dealer/investment advisor agrees to pay $40 million to settle pair of SEC actions charging failures to disclose payments to promote services and conflicts of interest. *In Matter of VALIC Financial Advisors*

7/30—SEC files settled fraud charges against former state legislator for running $23 million Ponzi scheme, with penalties and disgorgement to be determined by court at a later date. *SEC v Alford*

IN MEMORIAM

Thomas Gira, Executive Vice President of FINRA's Market Regulation and Transparency Services passed away on June 20, 2020. He was 58. Over the past few weeks, much has been written and discussed about Tom's stellar and well-respected regulatory career at the SEC, Nasdaq, and FINRA. Tom was involved in many of the most significant market structure and regulatory developments in the securities industry during the past three decades and was respected throughout the world.

The industry has lost a regulator with vision, one who protected the investor, maintained the integrity of the industry, did not shy away from the difficult questions, and always sought justice and to do what's right. Those of us who had the privilege of working with Tom have lost a role model, a mentor, a teacher, and a true friend. We have lost a kind and decent man of faith and dedication.

We extend our condolences to Tom's family and our friends at FINRA.

STAFF MOVES

4/13 The SEC named **Natasha Guinan** as Chief Counsel, Office of the Chief Accountant (OCA), where she will provide legal guidance to the Chief Accountant and the other OCA groups. Guinan first joined the SEC in 2008 as senior counsel in the Division of Enforcement. From 2013 to 2014 she was senior counsel in the Division of Enforcement and Investigations at PCAOB. Guinan rejoined the SEC in 2014 as Senior Special Counsel for Legal Policy in the Office of General Counsel.

4/24 **Louis Gracia** and **Vanessa Horton** were named Associate Directors of the Investment Adviser/Investment Company (IA/IC) examination program in the SEC's Chicago Regional Office. Gracia had been a Deputy Associate Regional Director in the Chicago IA/IC examination program since January 2015. Horton had been an Assistant Regional Director in the Chicago IA/IC examination program since December 2015.

5/11 The SEC announced that **Peter Uhlmann** would join the Office of Compliance Inspections and Examination Office of Chief Counsel as Assistant Director for Compliance, where he will oversee internal compliance, ethics, and operational risk management efforts. For the past three years, Uhlmann was the Managing Executive in the Office of Chairman, where he served as a lead adviser to the Chairman on matters related to agency administration, operations, and management.

5/11 The SEC named **John Moses** as the Managing Executive in the Office of the Chairman. Mr. Moses was previously the Deputy Director in the SEC's Office of Minority and Women Inclusion (OMWI). In this position, he played a key role in the agency's efforts to promote diversity, inclusion, and opportunity.

6/05 FINRA named **Rainia L. Washington** as Executive Vice President–Chief Human Resources Officer. Washington joined FINRA after a 26-year career at Lockheed Martin.

ENFORCEMENT NEWS

7/31— Pharmaceutical company and former executives agree to pay over $45 million to settle SEC charges of improper revenue recognition and misleading financial disclosures. *In Matter of Valeant Pharmaceuticals Int'l*

8/5—Two investment advisers agree to pay a combined $1 million to settle SEC charges for alleged misrepresentations about payment for order flow arrangements. *In Matter of WBI Investments*

8/6—Consumer loan company agrees to pay $21.7 million to settle FCPA charges with SEC. *In Matter of World Acceptance Corp.*

6/17 The SEC announced that **Jennifer S. Leete** had been named Associate Director in the SEC's Division of Enforcement. Leete succeeded Antonia Chion, who retired in February. Leete joined the Division of Enforcement as a staff attorney in 1999. She became a Branch Chief in 2003 and was promoted to Assistant Director in 2010.

6/30 FINRA announced that its Board of Governors had unanimously elected **Eileen Murray**, former co-CEO of Bridgewater Associates, LP, as Chairperson effective at FINRA's annual meeting in August. In addition, Maureen Jensen, former Chair and CEO of the Ontario Securities Commission (OSC), and Eric Noll, CEO of Context Capital Partners, were appointed to the FINRA Board as public governors, also effective at the August annual meeting.

8/03 The SEC named **Scott A. Thompson** Associate Regional Director for enforcement in the Philadelphia Regional Office. Thompson joined the SEC as a trial attorney in 2007 and was promoted to Assistant Regional Director in 2013.

8/05 The SEC announced that Division of Enforcement Co-Director **Steven Peikin** would leave the agency on August 14, 2020. Peikin was named Co-Director in June 2017. He served as an Assistant U.S. Attorney in the Southern District of New York from 1996 to 2004.

8/05 **Lindsay McCord** was named Chief Accountant in Division of Corporation Finance. McCord joined the Division in 2009 and was named Deputy Chief Accountant in 2017.

8/12 The SEC announced that Deputy Chief Accountant **Marc Panucci** would leave SEC. Panucci had been appointed in 2016 and led the Office of the Chief Accountant's Professional Practice Group.

8/17 **Caroline A. Crenshaw** and **Hester M. Peirce** were sworn-in as SEC Commissioners after being unanimously confirmed by the U.S. Senate on August 6, 2020. Commissioner Crenshaw's term expires in June 2024; Commissioner Peirce's term expires in June 2025.

8/18 **Diana Stoltzfus** was named Deputy Chief Accountant (Professional Practice Group) in the SEC's Office of the Chief Accountant. Stoltzfus joined the SEC from PricewaterhouseCoopers LLP, where she was a partner in the firm's assurance practice.

8/19 The SEC announced that **Marc P. Berger** had been named Deputy Director of the Division of Enforcement. Berger previously served as Director of the SEC's New York Regional Office. He served as an Assistant U.S. Attorney in the Southern District of New York from 2004 to 2016 and was Chief of SDNY's Securities and Commodities Fraud Task Force.

8/19 **Richard R. Best** was named Director of SEC's New York Regional Office. Best joined the SEC in June 2015 as the Regional Director of the SEC's Salt Lake Office, and was named Regional Director of its Atlanta Office in 2018. Before joining the SEC, was a senior director and chief counsel in FINRA's Department of Enforcement.

ENFORCEMENT NEWS

8/10—Broker-dealer agrees to pay $38 million to settle charges with SEC, FINRA and CFTC for alleged failures to file Suspicious Activity Reports and anti-money laundering failures. *In Matter of Interactive Brokers*

8/13—Issuer and CEO settle SEC charges for fraud and registration violations in connection with an initial coin offering for $5.75 million. *In Matter of Kelvin Boon, LLC*

8/13—Investment advisor settles SEC share class disclosure case with SEC for $767,000. *In Matter of SCF Investment Advisors*

8/13—Former CEO settles SEC charges of aiding and abetting issuer's financial reporting and disclosure violations, agreeing to pay $200,000 penalty and repay nearly $2 million to incentive-based compensation. *SEC v. Frissora*

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