

The New SEC Enforcement Program: Trust & Fairness

Last week new enforcement director Gurbir Grewal made his first public remarks at PLI's SEC Speaks 2021 ([October 13, 2021](#)). Mr. Grewal is the former Attorney General of New Jersey. He also served in the U.S. Attorney's Office for the Eastern District of New York.

The Remarks

The focus of Mr. Gurbir's remarks was trust. Specifically, only a small percentage of Americans have "any significant level of confidence in banks, technology companies or big business," he noted. With many people either losing or lacking trust in key institutions the question becomes what role the Commission can play in bolstering confidence and trust.

The reason for the loss of faith in key institutions does not trace to a single source, according to the Director. One cause, however, may be "the repeated lapses by large businesses, gatekeepers, and other market participants," he noted. That trend may be amplified by the belief of some that there are two sets of rules, one for the big and powerful and another for everyone else. That is something that the Commission and its enforcement staff can address through the key points the Director suggested: 1) corporate responsibility; 2) gatekeeper accountability; and 3) crafting appropriate remedies.

First, corporate responsibility is critical. The initial focus here is the statutes passed by Congress and the Rules crafted by the agency. Compliance here is not a question of "check the box" and move on. These statutes and rules are "important to ensure that the SEC and other law enforcement agencies can understand what happened and make appropriate prosecutorial decisions," according to Mr. Gurbir.

Disclosure of material events in a timely and accurate fashion is also essential. This type of disclosure builds confidence in the markets. Since it "not only enable[s] average investors to make informed investing decisions, but also [to] ensure that informed

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investors are able to hold management and boards accountable when they fall short” in key areas such as cybersecurity.

Second, gatekeeper accountability is critical to rebuilding investor trust. “When gatekeepers are living up to their obligations, they serve as the first lines of defense against misconduct. But when they don’t investors, market integrity and public trust all suffer,” the new Director stated. When those with gatekeeper responsibilities encourage others to play in the grey areas of the statutes and rules, it undermines the role and trust.

Finally, the enforcement division can help build trust by crafting appropriate remedies. Preventing a future reoccurrence of misconduct, in addition to punishing misconduct, is important to building public trust, according to the new Director. This begins with reinstating the use of admissions. The circumstances under which admissions might be demanded were not detailed.

The Division also intends to use remedies such as the officer and director bar. In view of its broad statutory authority, the agency can and will seek such an order even if the person was not at the time employed by a public company. The theory behind this approach appears to be that where the individual may become an officer or a director of a public company, a bar may be appropriate.

The potential increase in the use of bars will be paralleled with continuing, and perhaps increased use of conduct based injunctions. Those injunctions can, as in recent cases, be crafted to fit the precise circumstances of the case.

Two points round out the approach. One is the use of undertakings. The use of this approach, which frequently keys to remedial and compliance efforts, may be expanded. It may also tie to the second point which focuses on the Wells process and how settlements are negotiated. Moving forward the Division Director and his Deputy will limit their participation in these meetings to matters which involve new and perhaps novel issues of fact or law. Other cases will be resolved with members of the staff involved in the actual case. This approach may streamline and shorten settlement discussions which appears to be the purpose.

Comment

Increasing trust in the integrity of the markets is clearly a worthy goal. Eliminating situations where companies and individuals continually push the edge of the conduct that is acceptable also appears to be an appropriate approach. Indeed, the securities laws were designed to bring a new ethics to the market place. If in fact the new approach will be fashioned on this goal, it may in fact increase confidence in the markets, a prospect which should hold benefits for all.

At the same time, the new approach may have a hard-edged undertone that can undercut these goals. The use of admission such as those demanded in criminal cases, if expanded beyond the limited circumstances in which they were utilized in the past, may increase the difficulty of settlement and slow the resolution of cases. If officer and

director bars become a key remedy in a wide variety of cases along with conduct-based injunctions, settlement for an agency that has traditionally relied on resolving most actions on filing may be delayed or result in increased litigation again, not necessarily a productive approach for creating increased trust in the markets.

Overall, the key to the new approach may not be the comments made during the speech. Rather, the critical question for the new Director is likely to be how the program is administered. If new trust is to be built in the markets based at least in part on the Commission's enforcement program, that will begin with the manner in which the program is administered. It is easy and perhaps appropriate to be tough in obvious situations. It is not easy, however, to foster a culture of fairness that is in fact fair and creates the appearance of fairness. The goal is worthy. Achieving it is worthy. The process is more than difficult, but clearly possible.