



FOLEY  
HOAG LLP

# Securities Enforcement Under the Biden Administration

March 18, 2021



## Veronica Jennings

*Partner - Washington, D.C.*

Foley Hoag LLP

202-261-7316 | [vjennings@foleyhoag.com](mailto:vjennings@foleyhoag.com)



## Matthew E. Miller

*Partner - Boston*

Foley Hoag LLP

617-832-3041 | [mmiller@foleyhoag.com](mailto:mmiller@foleyhoag.com)



## John W.R. Murray

*Partner – New York*

Foley Hoag LLP

646-927-5521 | [jmurray@foleyhoag.com](mailto:jmurray@foleyhoag.com)

- President Biden has nominated Gary Gensler, former Chairman of the U.S. Commodity Futures Trading Commission (CFTC) from 2009 to 2014.
- Track record of vigorous enforcement: presided over LIBOR enforcement actions against major Wall Street banks and adoption of Dodd-Frank regulations governing swaps markets.
- New Director of the Division of Enforcement not yet named, but Enforcement priorities generally align with those of the Chair.
- Bottom line: likely shift in focus from retail on “Main Street” investors back towards large financial institutions and other systemically important actors, comparable to Enforcement program under former Chair Mary Jo White.

- Enhanced disgorgement authority: National Defense Authorization Act (NDAA) for 2021 amended the Securities Exchange Act of 1934 to provide express statutory authority to seek disgorgement of “any unjust enrichment” resulting from a violation in federal court.
- Also increases statute of limitations for scienter-based violations from five years to ten.
- Follows 2020 U.S. Supreme Court ruling in *Liu v. SEC* that disgorgement limited to net profits and called into question (i) SEC practice of seeking disgorgement jointly and severally and (ii) depositing proceeds into U.S. Treasury rather returning to investors. SEC may take position that NDAA supersedes these limitations.
- Enforcement may also be less willing to settle to non-scienter based charges and more incentivized to charge individuals.

- Restored delegated authority to issue Formal Orders of Investigation.
- Rescinded policy under which Enforcement recommended settlements conditioned on the SEC granting a waiver from automatic disqualifications from certain violations (e.g., loss of WKSI status, Reg D offerings).
- Corporate penalties: burden on shareholders may be less of a focus in assessment. (See Commissioner Crenshaw March 9, 2021 speech.) Democratic commissioners have tended to put less emphasis on presence/absence of corporate benefit and shareholder harm and be guided by egregiousness of the misconduct.

- Issuer disclosure actions down significantly in fiscal 2020 (lowest total since fiscal 2014), likely due in large part to the pandemic, though monetary relief of \$1.6 billion exceeded 2019 total.
- Continuing focus on disclosures of impacts of COVID-19 on operations and financial condition, a core mission of Enforcement's Coronavirus Steering Committee. *E.g., Matter of The Cheesecake Factory Inc.*
- Enforcement particularly focused on industries most affected by downturn, e.g. hospitality, transportation, construction, retail, oil and gas.
- Disclosures, impairments or valuations that may attempt to disguise previously undisclosed problems or weaknesses as COVID-related.
- Sophisticated use of data analytics to spot violations by comparing disclosures over time and scrutinize particular categories of data across companies.

- Likely to return to the fore after recent prioritization of retail investors.
- Focus on areas that Enforcement prioritized under former Chair White (e.g., private equity adviser conflicts of interest, allocation of fees and expenses) as well as those under Clayton (risk management practices and policies and procedures governing misuse of MNPI).
- OCIE Risk Alert in June 2020 and Division of Examination Priorities for 2021: will continue to shape Enforcement program.
- Less reliance on examinations to address issues in lieu of enforcement.
- Focus on funds investing in structured products (e.g. CLOs and MBS); Complex Financial Instruments Unit.

- Adopted in 2019 pursuant to Dodd-Frank; requires broker-dealers to act in the “best interest” of their retail customers in recommending securities.
- Reg BI remains controversial. Vigorously opposed by consumer advocates and Democratic commissioners seeking fiduciary standard and challenged in federal litigation (rejected by 2d. Cir. last year).
- Broker-dealers required to comply last June; Division of Examinations has flagged BI compliance as a priority.
- Gensler supported fiduciary standard as Chairman of Maryland Financial Consumer Protection Commission from 2017-2019.
- Enforcement likely to opt for vigorous enforcement over rule amendment in near term.



- Insider trading enforcement fell to lowest level under Trump Administration since mid-1990s.
- Enforcement warned last year of heightened risk of misuse of MNPI due to pandemic and resulting market volatility. Will remain a focus.
- Recent spikes in equities markets likely to spur renewed Enforcement interest in manipulative trading practices – both traditional “pump-and-dump” schemes and newer variants such as “spoofing.”
- Gensler’s track record of support for regulation of potentially destabilizing market activity also may encourage enforcement action.

- Joint SEC and DOJ enforcement of the FCPA at an apex: nearly \$2.8 billion in monetary relief in 2020 (bookended by Airbus and Goldman Sachs settlements).
- Biden Administration has identified anti-corruption as a “core national security interest.”
- Controversial practices of “no bribery” FCPA charges and expansive application of internal controls provisions will persist.
- Expanded 10-year statute of limitations under NDAA will benefit SEC enforcement, given relatively longer time horizon of FCPA investigations, and may encourage SEC to bring more scienter-based bribery charges rather than solely non-scienter-based internal controls and books and records charges.

- What are “ESG” risks and opportunities?
  - Environmental -- how a company deals with risks and opportunities related to climate, pollution and other environmental factors, and the company’s impact on the environment.
  - Social -- a company’s values and business relationships, including human capital topics like employee health and safety, as well as diversity and inclusion efforts.
  - Governance -- corporate governance issues, including the composition and diversity of the board of directors, political contributions, and policies to prevent bribery and corruption

- Current ESG Disclosure Guidance
  - SEC 2010 Climate Disclosure Guidance
  - Global Reporting Initiative (GRI) Standards
  - Sustainability Accounting Standards Board (SASB)
  - Task Force on Climate-related Financial Disclosure (TCFD)

“[I]t’s time to move from the question of “if” to the more difficult question of “how” we obtain disclosure on climate [and other ESG issues].”



Acting Chair  
Allison Herren  
Lee

- Assessment of company disclosures pursuant to 2010 guidance on climate disclosures
- Public comment on disclosure of climate risks, opportunities and impact
- ESG Task Force – Division of Enforcement
  - Identify material gaps or misstatements in issuer disclosures
  - Analyze compliance issues for investment advisors' ESG strategies

- Criminal securities violations are prosecuted by the Market Integrity and Major Frauds (MIMF) Unit of the Fraud Section of the Criminal Division of the Department of Justice and by the United States Attorneys throughout the country
- Criminal securities violations are also prosecuted by state enforcers using state fraud statutes, although this is far less common
- “Willful” violations of securities laws may give rise to criminal prosecutions
- Violations of securities laws may also give rise to mail and wire fraud charges
- Federal prosecutions of securities laws can originate by DOJ, USAO, or state criminal enforcement, or by a referral from the SEC

- Parallel civil and criminal proceedings for securities violations are generally permissible
- There are limitations on information sharing in parallel proceedings
- There are limitations on sharing grand jury information in parallel proceedings
- Legal observers expect to see an increase in insider trading criminal enforcement
- Evaluating the potential for criminal prosecution



- US. Supreme Court vacated the Second Circuit's Expansion of Criminal Insider Trading Liability
- On January 11, 2021, the U.S. Supreme Court vacated the 2019 decision of the U.S. Court of Appeals for the Second Circuit in *United States v. Blaszczak*, which substantially broadened the scope of criminal insider trading liability, and remanded the case to the Second Circuit for future consideration in light of the Supreme Court's decision last year in *Kelly v. United States*
- The Second Circuit held in *Blaszczak* that the government's burden under the Securities Exchange Act to prove that the insider received a "personal benefit" in exchange for tipping inside information, and that the insider's "tippees" were aware of that, does not apply to insider trading charges under the separate criminal securities fraud statute in Title 18 of the U.S. Code



## Veronica Jennings

*Partner - Washington, D.C.*

Foley Hoag LLP

202-261-7316 | [vjennings@foleyhoag.com](mailto:vjennings@foleyhoag.com)



## Matthew E. Miller

*Partner - Boston*

Foley Hoag LLP

617-832-3041 | [mmiller@foleyhoag.com](mailto:mmiller@foleyhoag.com)



## John W.R. Murray

*Partner – New York*

Foley Hoag LLP

646-927-5521 | [jmurray@foleyhoag.com](mailto:jmurray@foleyhoag.com)