

SEC Division of Enforcement Warns of COVID-19 Insider Trading Risks

Written by John W.R. Murray

March 25, 2020

Important Guidance for Issuers, Broker-Dealers and Investment Advisers

On March 23, the SEC Division of Enforcement (Enforcement) issued a public statement bluntly warning issuers and insiders connected to them, along with broker-dealers and investment advisers, about the unique risks of insider trading posed by the COVID-19 pandemic. The statement (available [here](#)), from Enforcement Co-Directors Stephanie Avakian and Steven Peikin, follows similar messaging from SEC Chairman Jay Clayton, but is more explicit with respect to the agency's concerns about heightened incentives to trade illegally on material non-public information, as well as its expectation that public companies and regulated entities must take active steps to minimize the potential for such trading.

Heightened Risk of Insider Trading

Given the magnitude of the crisis and the constant flow of new details to companies about its impact on operations and earnings, "corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances," the statement notes. This is especially so where logistical challenges resulting from COVID-19 delay the filing of earnings reports or other SEC disclosures, providing additional opportunity for insiders to profit from non-public facts about an issuer's operations and financial condition. (As we reported [here](#), the SEC, anticipating such delays, has granted issuers temporary 45-day filing extensions.) Hence, the Co-Directors observe, "a greater number of people may have access to material nonpublic information than in less challenging times."

The statement emphasizes that individuals who are privy to such information – including, but not limited to, directors, officers, employees, as well as consultants and other outside professionals – "should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading."

Internal Controls Under Scrutiny

The Co-Directors also "urge public companies to be mindful" of their internal controls and policies and procedures governing disclosure, prohibitions against insider trading, codes of ethics, and prohibitions against selective disclosure of material non-public information, including Regulation FD, in order to ensure "to the greatest extent possible that they protect against the improper dissemination and use of [such] information." Issuers should take careful note, given their obvious incentive not only to avoid liability under Regulation FD and prevent insider trading by employees, officers, directors, and others, but also to avoid the serious and often lasting reputational harm to the company that can result from these violations.

The statement also notes that broker-dealers, investment advisers, and other registrants are likewise subject to this expectation. (Registered broker-dealers and investment advisers, whether registered or not, are required by Section 15(g) of the Securities Exchange Act and Section 204A of the Investment Advisers Act, respectively, to have in place written policies and procedures reasonably designed to prevent the misuse of material non-public information.)

Takeaways for Companies and Registrants

The Co-Directors' statement sends two messages of immediate importance to issuers and registrants. First, Enforcement intends to prioritize insider trading in the context of COVID-19. Insider trading has long been a perennial focus for Enforcement, and its increased use of sophisticated data analytics in recent years to identify suspiciously-timed profitable or loss-avoiding trades has enhanced its ability to pursue these violations. The statement makes clear that the SEC views the coronavirus pandemic as an urgent impetus to maintain, if

not increase, this programmatic focus.

Public companies and regulated entities should also be alert to the possibility of criminal exposure. The U.S. Department of Justice routinely works covertly in parallel with the SEC in insider trading investigations, particularly where the evidence of scienter is compelling and the conduct is egregious. The government can be expected to take the view, at least in certain cases, that these circumstances are present where insider trading involves exploiting the COVID-19 crisis.

Second, the statement puts companies, broker-dealers and registered investment advisers on notice that their internal controls must be up to the task of addressing the unusual risks posed by the crisis. To meet this expectation, these entities should:

- Review their policies and procedures and codes of ethics to ensure that they are sufficiently specific in addressing insider trading, tailored to the nature and realities of the business, and extend, as applicable, to all categories of individuals identified in the March 23 statement.
- Provide supplemental written guidance to employees, officers and directors emphasizing the relevance of insider trading policies and procedures to the COVID-19 crisis, along with their obligations to familiarize themselves with and adhere to them.
- Given the Co-Directors' emphasis on the fast-developing nature of the pandemic and its effects on businesses, revisit and test the effectiveness of their controls on a continuing basis and modify them accordingly.
- Continue to conduct regular training. Companies and regulated entities should not relax their compliance efforts simply because the majority of their employees are working remotely. Training, whether by audio or videoconference, should address the specific risks posed by the pandemic and the particular importance of compliance in this context.

We will continue to provide updates on COVID-19-related guidance from the SEC.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

RELATED INDUSTRIES

- [Life Sciences](#)
- [Professional Services](#)
- [Technology](#)

RELATED PRACTICES

- [COVID-19 Task Force](#)
- [White Collar Crime & Government Investigations](#)
- [State Attorney General Investigations](#)
- [Public Companies](#)
- [Capital Markets](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.