

## SEC, OCIE and Enforcement Are Still Watching

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As the world is navigating through COVID-19 and as we are focused on our health and well-being as we self-quarantine and engage in social distancing to do our part to stop the spread, our markets remain open, active, and volatile, and the U.S. Securities and Exchange Commission (“SEC”) has recently made clear that they will continue to be an active overseer.

On March 20, 2020, the SEC’s Office of Compliance Inspections and Examinations (“OCIE”) issued a statement on [“Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities.”](#) In this statement, OCIE advised:

As it has done during other times of market stress, OCIE is actively engaged in on-going outreach and other efforts with many registrants to assess the impacts of COVID-19 and to gather information, including challenges with operational resiliency. In furtherance of these efforts, OCIE may discuss with registrants the implementation and effectiveness of registrants’ business continuity plans, particularly in the interests of protecting investors and the integrity of the markets.

Around that same time, OCIE issued certain registrants around the country document and information requests regarding the firms’ business continuity plans (“BCPs”). OCIE staff have been very respectful regarding this effort and they are willing to accept oral replies to the queries in the information request. That said, this effort confirms the statement above that OCIE is assessing the implementation and effectiveness of registrants’ BCPs during these strained times. Looking forward, as was the case regarding “Y2K” and BCPs, registrants should expect OCIE staff conducting assessments of BCPs during registrant examinations to be standard for the foreseeable future. In 2016, the SEC proposed Rule 206-4(4) under the Investment Advisers Act of 1940, which would have provided specific requirements around an investment adviser’s BCPs. While that rule was

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never adopted, at the time of its proposal, the staff published guidance regarding BCPs. In light of both the current reliance on BCPs, as well as OCIE's focus on them in this environment, we suggest registrants review their BCPs [in light of that guidance](#).

Not to be outdone, the Monday after OCIE's Friday statement, the Co-Directors of the SEC Division of Enforcement ("Enforcement") issued a public statement "Regarding Market Integrity." Enforcement's public statement initially and respectfully acknowledged that "The 2019 coronavirus disease (COVID-19) has impacted the securities markets in unprecedented ways." Thereafter, this public statement focused on insider trading issues. Specifically advising:

For example, in these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances. This may particularly be the case if earnings reports or required SEC disclosure filings are delayed due to COVID-19. Given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times. Those with such access – including, for example, directors, officers, employees, and 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.

Enforcement continued and closed by warning that they are "committing substantial resources to ensuring that our Main Street investors are not victims of fraud or illegal practices in these unprecedented market and economic conditions."

Historically, times of significant market volatility and severe market downturns are usually followed by a significant increase in the number of investigations opened and aggressively investigated by Enforcement. To minimize exposure to such investigative efforts, companies and individuals in possession of material non-public information should heed this guidance and remind officers, directors and employees of their obligations to keep corporate information confidential. In addition to being mindful of the potential misuse of material nonpublic information, companies should also carefully consider its disclosures in required reports and other public statements. Companies should consider whether and how COVID-19 may affect past and current disclosures (including without limitation risk factors and "MD&A") and update them accordingly.

On March 25, the SEC, recognizing the difficulties public companies are currently facing, [entered an order](#), subject to certain conditions, providing public companies with a 45-day extension to file certain disclosure reports that would otherwise have been due between March 1 and July 1, 2020.

More broadly, during this time, all companies, investment advisers, and broker-dealers should be cautious and strategic regarding their communications with clients and investors. Enforcement, with the benefit of hindsight, will most certainly be scrutinizing client and investor disclosures for misleading statements in the months ahead.

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