



The SEC and COVID-19

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Polsinelli COVID-19 Resources



Contact

For COVID-19 legal advice across a spectrum of issues impacting an array of industries and legal areas, our team is available and connected nationally and in the communities in which you operate.

Contact us with questions at:

COVID19CrossDeptResponseTeam@Polsinelli.com



Blog + Resources

Polsinelli's cross-disciplinary COVID-19 blog provides companies tools and information needed to effectively and lawfully protect their employees and business.

Visit our blog:

<https://www.covid19.polsinelli.com/>

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William Ezzell

- Represents individuals and companies in a wide array of government criminal and civil investigations, including health care fraud, False Claims Act, FCPA, and securities fraud.
- Extensive securities and complex commercial litigation experience, including shareholder derivative actions and Rule 10b-5 claims.
- Conducts internal investigations for small to mid-cap companies in complex and sensitive matters.



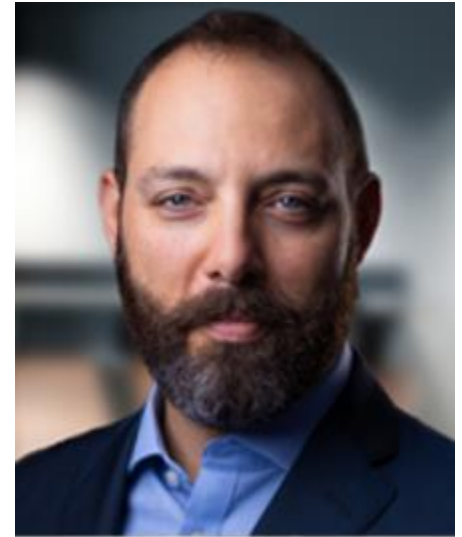
Melissa Ho

- Melissa Ho is vice chair of the firm's Government Investigations practice group. She is a trial and former state prosecutor with a detailed understanding of government regulations and business litigation.
- Melissa defends individual clients against a wide variety of criminal allegations, including health care fraud, qui tam, RICO violations, bank fraud, real estate fraud, mortgage fraud, foreign corrupt practices, securities fraud, water and air quality violations, government corruption, procurement and public fraud, professional misconduct, civil and criminal forfeiture, licensing violations, parallel proceedings, and computer crimes.
- On behalf of corporate entities, Melissa has conducted numerous internal investigations for clients, both self-initiated and in response to government inquiry.



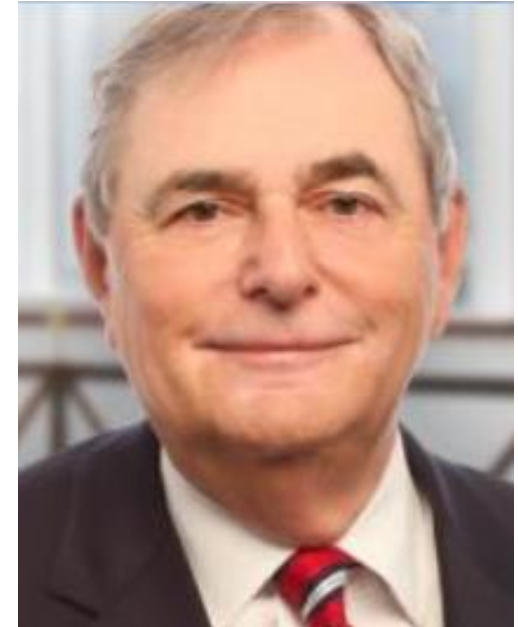
Jason Nagi

- Jason is a member of Polsinelli's the FinTech and Regulation and Financial Services Litigation and practice groups.
- Counsels companies in applying blockchain technology to their respective industries, fundraising efforts, and regulatory issues.
- Advises clients on SEC, CFTC, FinCEN, and state-level MSB issues, including the issuance of digital securities.
- Forbes Crypto Contributor
- Host of CryptoCharacters, a podcast focused on FinTech and innovation.
- Member of the Wall Street Blockchain Alliance advisory board.



Paul Roshka

- Represents parties in SEC, FINRA, and Arizona Securities Division investigations and proceedings and securities litigation in federal and state courts and securities arbitrations and mediations
- Serves as an arbitrator, mediator and expert witness
- Taught courses on white collar crime, organized crime and corporate crime in the undergraduate and graduate programs at Arizona State University



Agenda

- Overview of SEC Enforcement Priorities
- SEC Enforcement Statistics
- SEC Response to COVID-19
- SEC/DOJ Parallel Proceedings
- What Cooperation Really Means

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Recent Headlines

- “SEC Has Received Flood of Tips since Mid-March”

Chris Prentice, Reuters, May 12, 2020

<https://www.reuters.com/article/us-usa-sec-enforcement/tips-to-u-s-securities-and-exchange-commission-surge-in-recent-weeks-official-idUSKBN22O329>

Recent Headlines

- “SEC Enforcement Expected to Surge on COVID Volatility”

Al Barbarino, Law360, April 9, 2020

https://www.law360.com/securities/articles/1262118?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles

Division of Enforcement's Mission Statement

- The Division's mission is to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions

Division of Enforcement's Mission Statement

- Values integral to the Division's mission are:
 1. **Integrity:** acting honestly and impartially
 2. **Fairness:** assuring everyone receives fair and respectful treatment

Division of Enforcement's Mission Statement

- Values integral to the Division's mission are:
 - 3. Commitment:** recognizing the importance of and caring deeply about the SEC's mission of protecting investors and markets
 - 4. Teamwork:** supporting and cooperating with colleagues and other Divisions and Offices at the SEC and other law enforcement professionals

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SEC Staff

- Very smart
- Always prepared
- Extremely thorough
- A model of professionalism
- Totally committed to the matter being investigated

SEC Enforcement Priorities

- Guided by 5 core principles:
 - Focus on the retail investor
 - Focus on individual accountability
 - Keep pace with technological change
 - Impose remedies that most effectively further enforcement goals
 - Constantly assess allocation of resources

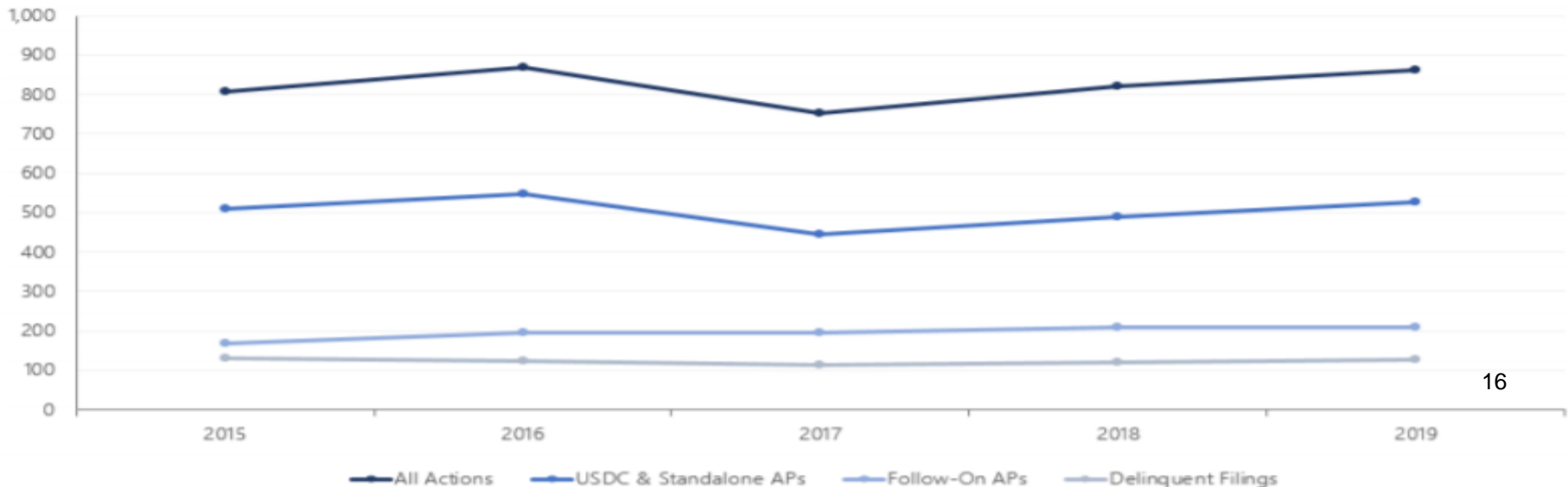
SEC Initiatives in FY 2019

- In addition to core principles, particular initiatives/areas of focus for FY 2019:
 - Focus on the retail investor
 - Focus on Cyber-Related Misconduct
 - ICOs and Digital Assets
 - Securing Systems against Cyber Threats
 - Leveraging Technology to Investigate Unlawful Trading

SEC Enforcement Statistics

Enforcement Actions Filed in Fiscal Years 2015 to 2019

	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
Standalone Enforcement Actions	526	490	446	548	508
Follow-on Admin. Proceedings	210	210	196	195	167
Delinquent Filings	126	121	112	125	132
Total Actions	862	821	754	868	807



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SEC Enforcement Statistics

■ Types of Cases



SEC Enforcement Statistics

Total Money Ordered (in millions)					
	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
Penalties	\$1,101	\$1,439	\$832	\$1,273	\$1,175
Disgorgement	\$3,248	\$2,506	\$2,957	\$2,809	\$3,019
Total	\$4,349	\$3,945	\$3,789	\$4,083	\$4,194

Money Distributed to Harmed Investors (in millions)				
FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
\$1,197	\$794	\$1,073	\$140	\$158

SEC and COVID-19

- SEC has received 4,000+ tips since mid-March
- Represents a 35% increase year over year
- February 4, 2020 Investor Alert “Look Out for Coronavirus-Related Investment Scams”

SEC and COVID-19

- On April 24, SEC announced formation of an internal “cross-divisional COVID-19 Market Monitoring Group”
- SEC has temporarily halted trading in the shares of about 30 companies due to claims related to COVID-19 tests, treatments or equipment

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SEC Trading Suspensions

1. Custom Protection Services, Inc. (5/5/2020)
2. CNS Pharmaceuticals Inc. (5/1/2020)
3. Moleculin Biotech, Inc. (5/1/2020)
4. WPD Pharmaceuticals, Inc. (5/1/2020)
5. Nano Magic Inc. (4/30/2020)
6. Kleangas Energy Technologies, Inc. aka CaliPharms, Inc. (4/27/2020)
7. Decision Diagnostics Corp. (4/23/2020)
8. Predictive Technology Group, Inc. (4/21/2020)
9. SpectrumDNA, Inc. (4/21/2020)
10. SCWorx Corp. (4/21/2020)
11. PreCheck Health Services, Inc. (4/16/2020)
12. Bravatek Solutions, Inc. (4/15/2020)
13. BioXyTran, Inc. (4/15/2020)
14. Signpath Pharma, Inc. (4/15/2020)
15. Applied BioSciences Corp. (4/13/2020)
16. Arrayit Corporation (4/13/2020)
17. Solei Systems, Inc. (4/10/2020)
18. Roadman Investments Corp. (4/10/2020)
19. Parallax Health Sciences, Inc. (4/10/2020)
20. Turbo Global Partners, Inc. (4/9/2020)
21. BioELife Corp. f/k/a U.S. Lithium Corp. (4/8/2020)
22. Key Capital Corporation (4/7/2020)
23. Prestige Capital Corp. (4/7/2020)
24. Wellness Matrix Group, Inc. (4/7/2020)
25. Sandy Steele Unlimited Inc. (4/3/2020)
26. No Borders, Inc. (4/3/2020)
27. Praxsyn Corporation (3/25/2020)
28. Zoom Technologies, Inc. (3/25/2020)
29. Eastgate Biotech Corp. (2/24/2020)
30. Aethlon Medical, Inc. (2/7/2020)

SEC COVID-19 Enforcement Actions

(or lies, lies, and more lies)

1. Applied Biosciences Corp.
2. Turbo Global
3. Praxsyn

Applied Biosciences Corp.

- Southern District of New York Enforcement Action
- Fraud based on COVID-19 testing kits and resources
- Company press releases
- Increased trading volume and stock price

Turbo Global

- Middle District of Florida
- Fraud based on present ability to sell thermal scanning equipment
- Company press releases
- Increased trading volume and stock price

Praxsyn

- Southern District of Florida
- Misleading release related to acquisition of N95 masks
- Company press releases
- Increased trading volume and stock price

Parallel Proceedings

- Have been permissible since as early as 1912 (Standard Sanitary Mfg. Co. v. United States). Parallel criminal proceedings are permissible to SEC investigation and enforcement actions. SEC v. Dresser Industries.
- As a result: corporations, their officers, and directors commonly subject to criminal prosecution, civil enforcement investigations, the whims of self-regulatory organizations as well as suits by private parties.

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Parallel Proceedings

- Keating Factors
 1. interest of plaintiffs and possible prejudice
 2. burden on defendants
 3. convenience of the court
 4. interest of third parties and the public
 5. defendant's right against self-incrimination

Parallel Proceedings

- Government usually receives their stay, until Theranos.

Parallel Proceedings

- AG Barr October 2019 remarks at the SEC Criminal Coordination Conference show the Government's history with Yates as well as a reminder of two recent policies
 - “Policy on Coordination of Corporate Resolution Penalties,”
 - Chairman Clayton issued a “Statement Regarding Offers of Settlement” that aligns the SEC’s waiver application process with the final approval and announcement of a resolution

Parallel Proceedings

- DOJ and SEC would like to incentivize companies to adopt sound corporate practices and policies by providing them with appropriate credit for good behavior and cooperation. For example they co-chaired the Financial Fraud Working Group and jointly published the Resource Guide to the FCPA.
- DOJ also announced revisions to the FCPA Corporate Enforcement Policy which incentivizes good corporate behavior, expands transparency for companies seeking corporate resolutions, and increases the effectiveness of related individual prosecutions.

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Parallel Proceedings

- **Assessing Risk: factors supporting a criminal prosecution**
 - the case has criminal prosecutorial appeal—, it presents compelling facts to which a jury can relate (e.g., major corporate fraud, securities fraud involving elderly people, and strong evidence of significant fraud), or the matter offers the government an opportunity to “send a message”—i.e., the Commission or the DOJ wishes to use the case to make a point or to set an example in an effort to thwart future misconduct of a similar nature; there are significant, provable losses to victims; there is an unsympathetic defendant; and the crime at issue is one which is publicly perceived as a significant law enforcement problem;

Parallel Proceedings

- the Commission staff is working with an Assistant United States Attorney, an FBI agent, or some other federal criminal investigator;
- grand jury subpoenas have been issued for documents or testimony;
- a related criminal investigation is under way, particularly if the client has received a “target” or “subject” letter concerning a grand jury investigation;⁸⁷
- the case has generated a high level of publicity that in and of itself will result in public pressure to bring a criminal prosecution.

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The Value of Cooperation

- SEC Considers 4 Factors to Evaluate Cooperation
 1. Assistance provided by the cooperator
 2. Importance of the underlying matter
 3. Interest in holding the individual accountable
 4. Profile of the individual

Cooperation in the Eyes of DOJ

- Yates Memo - September 2015 - Memorandum Re: Individual Accountability for Corporate Wrongdoing
- Announced formal policy of combating corporate crime by targeting and seeking accountability from the individuals involved in the wrongdoing
- Reiterated and formalized mandatory coordination among civil and criminal divisions in cases of corporate malfeasance
- Outlined 6 “key steps” for federal prosecutors to follow in order “to most effectively pursue the individuals responsible for corporate wrongs”

The Six Key Steps

1. Corporations must provide DOJ all relevant facts about the individuals involved in the corporate misconduct for cooperation credit.
2. Both criminal and civil DOJ corporate investigations should focus on individuals from the inception of the investigation.
3. Criminal and civil DOJ attorneys handling corporate investigations should be in routine communication with one another.
4. No corporate resolution will provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

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Changes to Yates Memo

- Still a focus on pursuing individuals involved in corporate fraud
- Cooperation credit no longer “all or nothing”
- To qualify for cooperation credit in criminal cases companies need to identify individuals who were substantially involved in wrongdoing
- Companies must identify all wrongdoing by senior officials, including members of senior management or the board of directors

How Does One Literally Cooperate?

- Most common approach: Proffers
- A method for individuals and entities to initiate a discussion concerning the potential benefits of cooperation in connection with an investigation or proceeding.
- Written agreement generally providing that the statements may not be used against that individual in subsequent proceedings

To Cooperate Or Not Cooperate ... That Is the Question

- Very Little Precedent
- Factors Targets and Subjects
 1. Culpability and Responsibility
 2. Timing
 3. What do you have to offer? (i.e. “Substantial Assistance”)

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Culpability and Responsibility

- Objective assessment of exposure and involvement
 - For companies, this could require internal investigation
- Are you a witness? Are you a target?

Timing Considerations

- Self-reporting: Not just for companies
- First to report: Potential whistleblower value

Whatcha Got? Can You Offer Substantial Assistance?

- Compliance with SEC investigation is **NOT** synonymous with cooperation
 - Producing documents in response to subpoenas is more compliance than cooperation
- Compliance becomes cooperation when one substantially shortens the investigation
 - Accept full responsibility where appropriate
 - Disgorge 100% of proceeds

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Types of Resolution Agreements

- Non-Prosecution Agreements
- Deferred Prosecution Agreements

Conclusion

Thank you.



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