

INSIGHTS

The Corporate & Securities Law Advisor

VOLUME 37, NUMBER 8, AUGUST 2023

ESG

The Big Three and ESG: A Guide to BlackRock, State Street and Vanguard Proxy Voting Policies and Guidance

3

Lyuba Goltser and Rebecca Grapsas

How Climate-Related Disclosures Are Driving a Wave of Greenwashing Litigation

19

Andrew Denny, Julia Becker, Gauthier van Thuyne, and Claire Rajan

EXECUTIVE PAY

Demonstrating Pay and Performance Alignment: A Comparison of Compensation Actually Paid and Realizable Pay

22

Ira Kay, Mike Kesner, Linda Pappas, and Ed Sim

Watching the Watchers: A Cautionary Tale Regarding Negative Say-on-Pay Vote Recommendations

30

Ed Hauder

SECURITIES LAWS LIABILITY

Supreme Court Confirms the Scope of Section 11's Tracing Requirement

31

Michael S. Flynn, Neal Potischman, Brian M. Burnovski, Marcel Fausten, and Daniel J. Schwartz

SEC ENFORCEMENT

No Hidden Balls at the SEC

34

Christian D. H. Schultz

AUDITS

Broadening the Scope of Public Company Audits: PCAOB Proposes an Expansive Non-Compliance Standard

36

James J. Farrell, Ron Hauben, Monica K. Loseman, Michael J. Scanlon, and David C. Ware

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INSIGHTS (ISSN No. 0894-3524) is published monthly by Wolters Kluwer, 28 Liberty Street, New York, NY 10005. To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660 or visit www.wolterskluwerlr.com.

For article reprints and reprint quotes contact *Wrights Media* at 1-877-652-5295 or go to www.wrightsmedia.com.

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SEC ENFORCEMENT

No Hidden Balls at the SEC

By Christian D. H. Schultz

In May 2022, at the Securities Enforcement Forum West Conference, Gurbir Grewal, the Director of the Division of Enforcement for the US Securities and Exchange Commission (SEC), created headlines in a speech that discussed perceived “gamesmanship” by defense attorneys in enforcement investigations.¹

[T]oo often, we see defense counsel—sometimes even including Enforcement alums—engage in conduct that seems to have little purpose other than to delay our investigations When we see counsel repeatedly encountering unexplained issues that delay productions across different clients and matters, it undermines both our process and trust between counsel and investigative staff. While this is different than the public trust I’ve spoken about so far, it’s critical to rebuilding that public trust. That’s because one of the most valuable qualities an effective defense lawyer can have is credibility with the staff. We’ve all experienced this firsthand—that close call when it’s counsel’s credibility that carries the day and drives a fair and timely resolution.

At the outset of a “fireside chat” at this year’s conference on May 23, Director Grewal seemed to change his tune slightly and made plain that defense counsel was only one side of the coin. Addressing his May 2022 remarks, Director Grewal said the

message also “should be heard loud and clear” by the Enforcement Division’s investigative staff that “this shouldn’t be a game of gotcha,” they “shouldn’t be hiding the ball,” and “should be straightforward” as part of the commission’s truth-seeking mission.

What got lost in that speech is that we all have to do better and that includes the lawyers on [the SEC’s] side of the ‘V’ as well, because this shouldn’t be a game of gotcha when we talk about Enforcement. We shouldn’t be hiding the ball, we should be straightforward, we should be engaged in robust discussions throughout the investigative process, we should be having reverse proffers where possible [to] move investigations along That sort of got lost in the speech last year.

Certainly, when there’s dilatory tactics employed by defense counsel that obstructs the truth-seeking mission of the Commission, it delays investigations, it’s bad for those individuals who are under investigation, and doesn’t really help anyone in the process Things have gotten better and I just didn’t want to lose sight of the fact that *we have a part to play and that message should be heard loud and clear by the staff* because we want to get to the right answer as quickly as possible because that benefits everybody; it benefits the market; it benefits your clients; and really helps us move things along.

It’s not clear what prompted Director Grewal to make these pointed remarks about his expectations

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of the investigative staff, perhaps questions that were raised in his review of their action memos or the “many” Wells meetings he has had with defense counsel over the past year. Only time will tell if this message is actually received by the investigative staff but defense counsel and their clients have reason to be hopeful.

Note

1. The speech is at <https://www.sec.gov/news/speech/grewal-remarks-securities-enforcement-forum-west-051222>. The headline is at <https://www.wsj.com/articles/sec-official-decries-delay-tactics-used-by-some-defense-lawyers-11652731535>.

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