

March 18, 2020

The Impact Of COVID-19 On SEC Defense And SEC Whistleblower Procedures

INTRODUCTION

A lot has been written recently about the novel coronavirus known as COVID-19. Comparatively few, if any, of those writings have addressed the impact of COVID-19 on defendants in SEC investigations¹ or its impact on SEC whistleblower procedures.

For the past two weeks or so, government press releases, traditional news outlets, and social media have informed the public about various “social distancing” recommendations, state and local emergency ordinances closing certain businesses and/or limiting the hours of operation of other businesses, and other matters of concern.

Many law firm memos and legal journals have reported on steps that corporations and businesses can, should, or must take not only with regard to their physical operations, but also with regard to securities disclosures, corporate regulatory filings, and transactional matters.

Much less has been written discussing considerations for defendants, witnesses, and whistleblowers involved with enforcement investigations being conducted by the United States Securities and Exchange Commission, or on the pandemic’s effect on the SEC’s investigations or its SEC whistleblower procedures.

¹ The SEC’s longstanding position has been that it does not have “defendants” in its investigations. Members of the securities and defense bars frequently use terms such as “defendant”, “target”, “subject”, and “witness” to differentiate among various parties and their relationships relative to the subject matter of SEC investigations.

THE SEC'S RESPONSE TO COVID-19 SO FAR

For “weeks prior” to March 9, 2020, the SEC was already making preparations for its Staff to work from their homes or “teleworking”.² This preparation included “conducting network capacity tests, and encouraging all employees to test their remote connectivity”.³

Unlike the dramatic upheavals caused at other agencies or businesses by abruptly switching overnight to teleworking, teleworking is not something new or unfamiliar to the SEC's Staff. For years, SEC Staff have been eligible to apply to telework from home for one or more days per week. The number of days eligible for teleworking varies depending on how long the particular Staff member has been employed at the Commission. It has even been rumored that some SEC Staff accountants have teleworked from home up to five days per week. While certainly disruptive, the impact on SEC Enforcement of teleworking in response to COVID-19 may be more of a difference in scale as opposed to a difference in kind.

The SEC's preparedness was put to the test on March 9, 2020, when the Commission announced that an employee working in its Home Office in Washington, D.C. had been diagnosed with COVID-19. In response, the SEC instructed many of its Staff to telework from home. A notice titled “SEC Operating Status” on the home page of the SEC's website announced:

Many SEC staff located in our Washington, DC headquarters are currently teleworking. During this period, the SEC remains fully operational and focused on fulfilling our mission on behalf of America's investors and our markets.⁴

The SEC thereby became the first federal government agency to respond to COVID-19 by sending its staff home to telework.

By the end of that week, SEC employees in other regional offices were also teleworking from home as a precaution, including employees of the Enforcement Division in the SEC's New York Regional Office.

² SEC Coronavirus (COVID-19) Response at 1, as found on March 17, 2020 at <https://www.sec.gov/sec-coronavirus-covid-19-response>.

³ *Id.*

⁴ www.sec.gov, as of March 17, 2020.

According to the Commission:

Our experience over the course of the week of March 9 [2020] provides us confidence that the agency will continue to be able to maintain operations in a full telework posture. As with any large-scale operational shift, we expect adjustments in certain functions, including with respect to information technology, may be necessary or advisable.⁵

Specifically with regard to the Division of Enforcement, the Commission explained:

Like the rest of the agency, the Division of Enforcement and the Office of Compliance Inspections and Examinations continue to execute on their mission of protecting investors and remain fully operational.⁶

IMPLICATIONS FOR SEC DEFENDANTS

This means that SEC defendants should not expect their investigations to simply go away due to COVID-19. However, the SEC's usual investigatory procedures may be modified in certain instances until the virus has been brought under control and things return to normal.

For example, the SEC may be more flexible in granting requests to extend deadlines to respond to investigatory subpoenas where the subpoena recipient either cannot physically access large troves of its paper documents, or is hampered in its efforts to comply due to staffing or other issues related to COVID-19.⁷

Document productions in response to SEC investigatory subpoenas will still go through the SEC's ENF-CPU department in Washington, D.C., which, with the Staff teleworking, may slow down the SEC's intake and review process. For large document productions that are made in paper copy, the time for the SEC to process

⁵ SEC Coronavirus (COVID-19) Response at 2.

⁶ *Id.* at 5.

⁷ *See, e.g.*, United States Court of Appeals for the Ninth Circuit's COVID-19 Notice (as of 3/17/20) at 1 (stating that "Because the national response to the pandemic has disrupted services of all kinds, the Court will extend non-jurisdictional filing dates as needed"), as found on March 17, 2020 at <http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf>.

those productions, transmit them to the appropriate Enforcement Staff, and for the Staff to review them may be temporarily delayed. For smaller productions, and for possibly faster processing and review of larger productions, the SEC might begin to press more strongly for document productions to be made electronically.⁸

With regard to conducting on the record investigatory testimony (“OTR”), one option might be to request a postponement of certain OTRs until after the current period of social distancing is rescinded, provided there is enough time to complete those OTRs before the applicable statute of limitations expires.⁹ Another option could be for the Staff, the witness, and the witness’s counsel to attend the OTR either telephonically or by video.¹⁰

⁸ *Id.* (strongly encouraging attorneys and parties with access to the CM/ECF system “to use it for everything”, and encouraging pro se litigants to submit their filings by e-mail directly to the Court).

⁹ Such as the five-year statute of limitations on SEC disgorgement actions imposed by the U.S. Supreme Court in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017). For a discussion of *Kokesh* and pending legislation to address that decision, see The Pickholz Law Offices’ January 7, 2020 Securities Law Update at <https://pickholzlaw.com/securities-law-updates/sec-remedy.html>.

¹⁰ *See, e.g.*, United States Court of Appeals for the Ninth Circuit’s COVID-19 Notice (as of 3/17/20) at 1 (regarding oral arguments, authorizing courts to “exercise their discretion under the rules to submit cases without argument; to postpone argument to a later date; or to hold argument via telephone or video. When argument is held, it will be live streamed to facilitate public access”); United States Court of Appeals for the Federal Circuit Public Advisory Concerning The Federal Circuit’s April 2020 Sitting at 1 (March 12, 2020) (arguments to be conducted by telephonic conference “if counsel for either party is located outside of the National Capital area”), as found on March 17, 2020 at <http://www.cafc.uscourts.gov/announcements>; Northern District of Ohio Notice To Visitors (explaining that “The Court will make reasonable accommodations to reschedule appearances or you may be permitted to appear via teleconference or videoconference with the approval of the presiding judge”), as found on March 17, 2020 at <https://www.ohnd.uscourts.gov/sites/ohnd/files/Notice%20to%20Visitors%20re%20Coronavirus.pdf>.

IMPACT ON SEC WHISTLEBLOWER PROCEDURES

As of today, COVID-19 appears to be having more of a logistical as opposed to a substantive effect on investigations involving SEC defendants. Its early effect on SEC whistleblower procedures seems to be somewhat less significant.

Unlike during the budget crisis that shut down the federal government for 35 days from December 2018 - January 2019, COVID-19 has not shut down the federal government. Yet even during the 2018-2019 government shutdown, the SEC's OWB continued to monitor its tips, complaints, and referrals system ("TCR"), and it continued to follow its SEC whistleblower procedures albeit in a somewhat limited capacity.¹¹

The SEC's Office of the Whistleblower ("OWB") is part of the Division of Enforcement. As stated above, the Division of Enforcement remains "fully operational".¹²

The OWB is located in the SEC's Home Office in Washington, D.C. Because the SEC's Staff in its Home Office have been teleworking from home, COVID-19 may impact SEC whistleblower procedures by delaying the OWB's intake and review process for hard-copy Form TCR submissions that are faxed or mailed to the OWB.

However, this may not dramatically alter SEC whistleblower procedures in the short term, as the OWB already:

... encourages all individuals to submit their whistleblower tips and any additional information electronically through the Commission's online portal. There are several advantages to using the online portal, including the fact that individuals receive an immediate acknowledgement of their submission along with a confirmation number. The tip is also automatically populated in a queue for staff who triage tips and complaints. For greater efficiency and

¹¹ See "Can SEC Whistleblower Tips Be Submitted During The Shutdown?", The Pickholz Law Offices (Jan. 3, 2019), found online at <https://pickholzlaw.com/sec-whistleblower-tips.html/>.

¹² SEC Coronavirus (COVID-19) Response at 5.

quicker review, OWB recommends electronic submission over hard-copy submission.¹³

The SEC's Office of Market Intelligence ("OMI") already commonly requests additional information from whistleblowers electronically by e-mail, so the SEC whistleblower procedures for the initial review of Form TCR submissions should not be dramatically affected by COVID-19.

The SEC whistleblower procedures for Enforcement Staff's communications with whistleblowers already encompasses telephonic meetings, in addition to live meetings. In fact, it is not unusual for Enforcement Staff to request that shorter meetings be conducted telephonically, such as meetings expected to last for around one hour rather than all day.

CONCLUSION

SEC investigatory defendants should not count on COVID-19 somehow making their investigations go away. The more likely short-term impact would seem to be in connection with investigatory deadlines; the mechanics of large hard-copy document productions and reviews; and either the temporary postponing of OTRs or conducting them by video or telephonically where the parties agree to do so.

The Commission's response measures to COVID-19 appear to be having an even less significant impact on SEC whistleblower procedures, where the preferred method of submitting Forms TCR is already electronically through the SEC's online whistleblower portal, and where SEC Staff are already used to communicating with whistleblowers and SEC whistleblower attorneys through e-mail and telephonically.

Of course, a national emergency was only declared a little more than a week ago, and there is still a long way to go before COVID-19 is under control. Depending on how long that takes, and what occurs in the interim, the pandemic's impact on SEC defendants and SEC whistleblower procedures could change subtly or more dramatically.

Interested parties should continue to monitor the SEC's website and legitimate news sources for further developments pertaining to the SEC's investigations practices and its SEC whistleblower procedures.

¹³ SEC 2019 Annual Report to Congress on the Whistleblower Program (Nov. 15, 2019) at 7, as found on March 17, 2020 at <https://www.sec.gov/files/sec-2019-annual%20report-whistleblower%20program.pdf>.

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ABOUT THE PICKHOLZ LAW OFFICES LLC

The Pickholz Law Offices LLC is a law firm that focuses on representing clients involved with investigations conducted by the U.S. Securities and Exchange Commission, FINRA, and other securities regulators.

The Pickholz Law Offices has represented employees, officers, and others in **SEC whistleblower cases** involving financial institutions and public companies listed in the Fortune Top 10, Top 20, Top 50, Top 100, Top 500, and the Forbes Global 2000. We were the first law firm ever to win an SEC whistleblower award for a client on appeal to the full Commission in Washington, an achievement that Inside Counsel magazine named one of the five key events of the SEC whistleblower program. Examples of the Firm's SEC whistleblower cases are available at https://pickholzlaw.com/sample_matters.

In addition to representing SEC whistleblowers, since 1995 the Firm's founder, Jason R. Pickholz, has also represented many clients in **securities enforcement investigations** conducted by the SEC, FINRA, the U.S. Department of Justice and US Attorney's Offices, State authorities, and more. Examples of some of the many securities enforcement cases that Mr. Pickholz has been involved with are available at https://pickholzlaw.com/sample_matters#1578408398642-63454090-a2fe.

You can see what actual clients have had to say about The Pickholz Law Offices by going to the Client Reviews page on our website.

HOW TO CONTACT THE PICKHOLZ LAW OFFICES LLC

If you would like to speak with a securities lawyer or SEC whistleblower attorney, please feel free to call Jason Pickholz at **347-746-1222**.

The Pickholz Law Offices remains open and will be fully operational through teleworking while we all grapple with this terrible pandemic. We hope that all of our clients, colleagues, friends, and their families remain safe and healthy, and our thoughts and prayers go out to everyone who has been affected by COVID-19.

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