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SEC's Gurbir Grewal stumps for proactive compliance in first speech



By Jaclyn Jaeger | Fri, Oct 8, 2021 12:49 PM

In his first publicized speech as director of the Securities and Exchange Commission's Division of Enforcement, Gurbir Grewal spoke to the importance of "modeling excellence" in compliance efforts.

"This means that firms need to think rigorously about how their specific business models and products interact with both emerging risks and enforcement priorities and tailor their compliance practices and policies accordingly," Grewal **said** at the Practising Law Institute's Broker/Dealer Regulation and Enforcement 2021 event Wednesday.

Grewal **took over** as head of enforcement at the SEC in July. He joined the agency after serving as New Jersey's attorney general since January 2018.

In his speech, he cautioned firms on seeking shortcuts to maintaining compliance. Listing special purpose acquisition companies (SPACs); environmental, social, and governance (ESG) investments; and Regulation Best Interest (Reg BI) as specific examples, he said, "If regulators are particularly focused on issues 'X' or 'Y' in a given area, that means you or your clients may be able to push the envelope on issue 'Z'—or the grey areas around X or Y. That approach is a surefire way to foster misconduct and, potentially, lead to an enforcement action."

Grewal stressed the need for "proactive compliance," which "requires market participants to not wait for an enforcement action to put in place appropriate policies and procedures." In this technological age, businesses "need to be actively thinking about and addressing the many compliance issues raised by the increased use of personal devices, new communications channels, and other technological developments like ephemeral apps," he added.

Cooperation: Ensuring "proactive compliance efforts continue even after violative conduct has occurred and by working with us in addressing that conduct" plays a key role

in spotting and addressing emerging risks, Grewal said.

He also attempted to offer further clarity regarding what gets companies cooperation credit.

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Gurbir Grewal, Director, SEC Division of Enforcement

"First, let me be clear about what cooperation is *not*: Cooperation is not the mere absence of obstruction," Grewal said. "We do not recommend that parties receive credit for simply living up to their legal and regulatory obligations."

Cooperation that results in credit means *more* than responding to a subpoena, making witnesses available for testimony, or self-reporting to the SEC when the violation is about to be publicly announced. "And it certainly means more than conducting a purportedly independent investigation and making a presentation to the staff that does not fairly present the facts, but instead is nothing more than an advocacy piece," he said.

Rather, Grewal said, "I look to whether the would-be cooperator took significant, tangible steps that enhanced the quality of our investigation, allowed us to conserve resources and bring charges more quickly, or helped us to identify additional conduct or other violators that contributed to the wrongdoing. If any or all of these occurred, then credit may be appropriate."

Grewal also provided some blunt words of advice on trying to get one over on the SEC: "If you think you deserve credit, and the staff disagrees, I encourage you take a hard, objective look at your conduct during the investigation before trying to convince me the staff is wrong."

Monetary penalties: Grewal spoke about the factors that guide the SEC as it tailors its penalty recommendations. One question the agency tries to answer is what penalty will appropriately deter future misconduct.

"Central to deterrence is proportionality," he said. "The worse the conduct, the more strongly we want to disincentivize market participants from engaging in it. We must

design penalties that actually deter and reduce violations and are not seen as an acceptable cost of doing business."

The SEC will closely assess "whether prior penalties have been sufficient to generally deter the misconduct at issue," Grewal said. "Where they have not been, you can expect to see us seek larger penalties, both in settlement negotiations and, if necessary, in litigation."

Recidivism is another factor that weighs in SEC penalty assessments. "When a firm repeatedly violates our laws or rules, they should expect to be penalized more harshly than a first-time offender might be for the same conduct," Grewal said.