

SEC Signals No Patience For Fake News On Stocks

By **Carmen Germaine**

Law360, New York (April 11, 2017, 9:41 PM EDT) -- The U.S. Securities and Exchange Commission filed charges Monday against a whopping 27 respondents for disguising promotions as independent research in a move experts said is calculated to send a message the market can't ignore and could be a sign of more cases to come.

Monday's charges constituted the largest set of actions the agency has brought over violations related to stock touting, with charges filed against over two dozen individuals, companies and firms alleged to have run several schemes to write bullish articles posing as independent research.

The agency made hay of the cases, which included two complaints filed in New York federal court and multiple settled administrative proceedings, issuing an alert warning investors that seemingly unbiased articles could be written by someone in the company's pocket. In a press call discussing the charges, SEC Enforcement Division acting Director Stephanie Avakian said the agency intended to send a stern message.

"Today's actions should serve as a warning to others whose business model revolves around generating research that falsely represents itself as independent," Avakian said.

Experts agreed that the agency's decision to bring the cases, which involved several different and distinct promotion companies, indicated the agency intended to make noise.

Stephen Crimmins, an attorney with Murphy & McGonigle PC and a former SEC enforcement attorney, said these matters are often smaller — among the settled administrative cases announced Monday, the largest fine was \$2.9 million in disgorgement, interest and penalties — and can be difficult for the agency to devote resources to.

"Every now and then, it has to make a powerful statement," Crimmins said. "The best way it can do that is — rather than dribbling out a small number of cases — to instead bring out a bunch of them at the same time and generate a bigger impact, both to tell people expressing views on stock that the SEC is serious about enforcing the rules and also to alert investors that they should be wary about what they read on the web."

The timing of the charges also helped the agency make waves, WilmerHale partner Daniel F. Schubert said, while "fake news" remains a big topic in the public eye.

"These cases, I think, from a thematic standpoint fit into that nicely for the SEC — it's something that people are paying attention to," Schubert said.

In announcing the charges, Avakian had acknowledged that the cases were different from the type of fraud cases the SEC typically brings, comparing a case where the agency alleges someone made misrepresentations about the company being touted to Monday's allegations that the analysis was fraudulently presented as impartial when it was "bought and paid for."

But Schubert said that on a more fundamental level, the cases also "go really to the heart of what the SEC does" by sending a strong message that issuers and promoters must be transparent to investors.

The actions targeted several promotional and communications firms, including Lidingo Holdings LLC, Lavos LLC and Dunedin Inc., as well as each firm's owner and multiple writers who the SEC said were paid by the firms to write bullish articles promoting issuers who had hired the firms.

According to the SEC, the promotional firms worked to conceal that the articles were commissioned, publishing the puff pieces under a variety of pseudonyms and instructing the hired writers to not disclose they had been paid.

In one instance, for example, Lidingo owner Kamilla Bjorlin referred to a hired author who had disclosed his compensation as "the idiot we used in the beginning" and assured her colleague that the author would "NOT post a disclosure again," according to the SEC's federal complaint.

Bjorlin also asked some writers hired by Lidingo to sign nondisclosure agreements prohibiting them from disclosing their compensation, the SEC said. When one writer told Bjorlin that the investment site Seeking Alpha had contacted him about whether he was writing article for payment, she assured the writer that the website was "simply fishing," according to the complaint.

Beyond just omitting their compensation, the SEC alleged that many of the writers falsely said they were not receiving compensation for their views in articles published on Seeking Alpha.

"What probably drove these cases is that, in a number of these instances, you have writers posting under pseudonyms and actually affirmatively stating that they weren't being compensated when allegedly they were," said Andrews Kurth Kenyon LLP partner Matthew Nielsen.

Nielsen said that concealing compensation in that fashion flouts Section 17(b) of the Securities Act of 1933, which prohibits publishing or circulating an article or communication for "a consideration received" without fully disclosing that consideration — a provision that applies whether authors simply neglect to mention their payment, or falsely state they weren't paid.

That section may be a lesser-known of the SEC's enforcement program, Crimmins said, but it is an important one.

"If you're a writer in the financial space, you should be aware of it, and the SEC's sending a strong message that they'll hold you accountable whether you're aware of it or not," Crimmins said. "Part of the education process is the cases they bring, and this is an example of that."

Liability for issuers who hire promotional firms is more complicated. The U.S. Supreme Court has ruled that to be held liable for a statement, issuers must have "ultimate authority" over the statement, and at

least the Eleventh Circuit has held that paying for promotional articles doesn't mean an issuer had that authority. That circuit also said companies are allowed to pay for promotion.

But the SEC said in administrative settlements filed with the three issuers charged on Monday — Galena Biopharma Inc., ImmunoCellular Therapeutics Ltd. and Lion Biotechnologies Inc. — that the companies' CEOs had directed the promotional work and understood that the promotional firms were using writers who weren't disclosing their payment.

The issuers' control over the statements and knowledge of the alleged omissions makes these cases more clear-cut, Nielsen said.

"When the company is the one behind it and is directing a fraudulent promotion, that's where you're going to see the SEC take action," Nielsen said.

Nielsen said that the whole set of cases is reminiscent of the type of fraud cases the SEC brought more frequently before the financial crisis. As the agency moves past the crisis era under a new chair — Sullivan & Cromwell LLP partner Jay Clayton, who has pledged to remain tough on financial crime but appears less interested in cases at the margins of securities law — this kind of "bread-and-butter" case could become more common, Nielsen said.

"That may be why the commission announced these cases together: to make a big splash to send a message to the market," he said.

The respondents were represented by attorneys with Debevoise & Plimpton LLP, Allen/Fuller PA, Gartenberg Gelfand Hayton LLP, Meyers & Heim LLP, The Law Offices of Seth Weinstein, Latham & Watkins LLP, Skadden Arps Slate Meagher & Flom LLP, Shulman Rogers Gandal Pordy & Ecker PA, King & Spalding LLP, Cooley LLP, Sidley Austin LLP, Dickinson Wright PLLC, The Law Offices of Steven Goldsobel, Vorndran Shilliday PC, Bartlett Legal, Sher Tremonte LLP, Koenig Law Group PC, Buckley Sandler LLP and Shustak Reynolds & Partners PC.

The administrative cases are In the Matter of Joel Corenman, Galena Biopharma Inc. et al., ImmunoCellular Therapeutics Ltd., Craig Keolanui, Lion Biotechnologies Inc., Edward Borrelli et al., Stephen Ramey, Michael A. McCarthy et al., Ciaran Thornton, Manish Singh et al. and Christopher French, case numbers 33-10336 through 33-10347, before the Securities and Exchange Commission. The federal cases are Securities and Exchange Commission v. Lidingo Holdings LLC et al., case number 1:17-cv-02540, and Securities and Exchange Commission v. CSIR Group LLC, case number 1:17-cv-02541, both in the U.S. District Court for the Southern District of New York.

--Editing by Katherine Rautenberg and Catherine Sum.