

Chasing The Gatekeepers

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In an [earlier post](#) on our Government Enforcement Exposed blog, we highlighted the Securities and Exchange Commission's anticipated focus on cracking down on those they have referred to as "gatekeepers" – attorneys, auditors, accountants, compliance officers, and the like. As pointed out in our prior post, SEC Commissioners have stated in public speeches that they intended on using new rules and novel approaches to prosecute all responsible individuals involved in facilitating a securities violation.^[i]

True to its word, the [SEC recently announced](#) that it was instituting administrative proceedings alleging fraud against an attorney and seven auditors for their peripheral role in an attempt by a Canadian-based attorney, John Briner, to effectuate a microcap pump-and-dump scheme. The recent charges stem from a stop order proceeding and subsequent suspension in early 2014 by the SEC of 20 mining companies. The companies were suspended for making false registration statements that indicated they were being run by certain individuals, when they were in reality being secretly run by Briner. In fact, Briner previously had been suspended from practicing for SEC regulated companies and enjoined from violations of the securities laws due to his involvement in a prior securities fraud scheme in 2010.

In this second go-round for Briner, he allegedly recruited the assistance of acquaintances to act as CEOs of the 20 mining companies that he controlled and capitalized, and sought the assistance of a U.S.-based attorney and two U.S.-based audit firms to aid in making the shell companies appear legitimate. The SEC has charged the attorney and 7 partners of two different audit firms Briner had hired for their involvement in the scheme. The SEC alleges that the U.S.-based attorney drafted opinion letters for 18 of the 20 shell companies and made false statements that she conducted an investigation of the companies' stock issuances. The SEC also alleges that the 2 auditing firms and its respective partners conducted such a deficient audit of the shell companies that the audits "amounted to no audits at all."

In the SEC's opinion, if the audits had been conducted properly, the audit firms would have been warned of Briner's fraudulent conduct. The SEC also announced that it had entered into settlements with several of the phony CEOs, requiring disgorgement and penalties and D&O bars. For the so-called gatekeepers such as attorneys, accountants and the like, the SEC's allegations against the auditors in particular should ring alarm bells. The attorney's actions clearly violated SEC regulations in that she made false statements to perpetuate a fraud. But the auditors are not accused of making false statement.

Our prior post on the SEC's intention to pursue gatekeepers for wrongdoings focused on the Commission's anticipated use of current rules and regulations in novel ways (particularly the use of Section 20(b)). The *Briner* case in its treatment of auditors is altogether different. In this instance, the SEC is essentially alleging willful violations of Section 17(a) on the part of financial auditors for alleged failures to comply with auditing standards, failure to do appropriate due diligence, and even ignoring red flags (such as Briner's prior

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involvement in a securities fraud scheme and subsequent injunction). Similarly, the attorney here allegedly also did little if any investigation of the companies and ignored evidence that Briner was behind all of them.

Rather than employing new applications of Section 20(b), the SEC here is relying on time-tested tools in its enforcement toolbox. Whether the auditors were complicit in Briner's fraud or whether they simply did a terrible job is unclear. Certainly, at this point, there are only the SEC's allegations which have yet to be litigated. However, to the extent the latter is the case, gatekeepers have been duly warned. [\[1\]](#) It should be noted that employing new rules, such as Sarbanes-Oxley and Dodd-Frank, is a periodic trend of the SEC. However, our earlier post focused on using old rules in new ways to prosecute wrongdoers.