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Securities and Exchange Commission Year in Review: Enforcement Actions and Issues from 2019—Part 2

By Lisa C. Wood, John W. R. Murray, and Christian A. Garcia

In this article, we continue our discussion from the January issue of *The Investment Lawyer*, in which we examine Securities and Exchange Commission (SEC or Commission) Division of Enforcement (the Division or Enforcement) activity, and related developments within the agency, during fiscal year 2019, taking into account how these priorities have driven the Enforcement program over the past year and where they are likely to lead the Division in 2020. We also examine factors outside the SEC—particularly developments in the case law that have curtailed, or may limit, the scope of the SEC's enforcement power. Specifically, this installment addresses: (1) enforcement activity and related developments targeted at asset managers; and (2) Enforcement's continued focus on a number of other important areas, including cybersecurity and regulation of digital assets, insider trading, the SEC's whistleblower program, municipal securities, and Foreign Corrupt Practices Act (FCPA) cases.

Investment Advisers Remain a Prime Target for SEC Enforcement

As in 2018, the SEC's mission to protect retail investors has brought about an intense focus on investment advisers, with over a third of the standalone cases that the Division of Enforcement brought in fiscal 2019 involving investment advisory or investment company issues. Consistent with the SEC's past practice, most of these cases were brought as administrative proceedings. The SEC tends to prefer that forum to federal court in cases involving misconduct by investment advisers and broker-dealers given the appropriateness of the remedies available in administrative proceedings, such as cease-and-desist orders, censures, bars from associating with a broker-dealer or investment adviser, and revocation of registration with the SEC.[1]

The actions that the SEC brought against advisers in 2019 primarily involved (1) failure to disclose conflicts of interest, (2) improper valuation of assets under management, (3) improper fees and costs to investors, and (4) Ponzi or other schemes to misappropriate funds from advisory clients. Whereas in prior years the SEC's cases against advisers have been spearheaded by the Asset Management Unit (AMU), some of the most significant actions against advisers in 2019—particularly those involving disclosure of conflicts—were brought by the Complex Financial Instruments (CFI) Unit, either alone or in conjunction with the AMU, where the relevant portfolio assets consisted of complex financial products such as structured notes or mortgage-backed securities. The CFI Unit's presence in this space reflects the heightened interest in these issues within Enforcement.

Disclosure of conflicts, valuation, and fees and expenses were especially frequent subjects of the enforcement actions filed in 2019, and we examine several of those below. These topics also have drawn the close attention of the SEC's Office of Compliance Inspections and Examinations (OCIE), which frequently refers its findings of deficiencies and red flags in its examinations of registered entities to the Division of Enforcement for further investigation. OCIE listed these issues among its examination priorities for 2019,[2] and issued a Risk Alert in April 2019 to report its finding that advisers frequently imposed fees and expenses inconsistent with the terms of their advisory agreements and Forms ADV.[3] Given OCIE's frequent collaboration with Enforcement in building cases against investment advisers, we can anticipate continued intense enforcement activity against investment advisers in these areas.

Success of the Share Class Disclosure Initiative

In the interest of maximizing the effectiveness of its limited resources, the Division of Enforcement in February 2018 announced the Share Class Disclosure Initiative (SCDI), a self-reporting program for investment advisers that failed to disclose the conflicts arising from 12b-1 fees—that is, marketing and distribution fees commonly charged by one or more classes of a mutual fund. Those fees are commonly paid to investment advisers in their capacity as brokers, to their broker-dealer affiliates, or to personnel who also are registered representatives. Enforcement had found that, despite its efforts to force disclosure of this conflict through enforcement actions, the problem persisted. Its response was the SCDI, a voluntary program managed by the AMU, whereby investment advisers could self-report their failures to disclose conflicts arising from 12b-1 fees no later than June 12, 2018. Although self-reporting advisers are required to disgorge any undisclosed fees for distribution to harmed investors, Enforcement recommended to the Commission that any penalties be waived as to participants in the SCDI. Enforcement Co-Director Steven Peikin has described the SCDI as "an efficient approach to remedy a pervasive problem."[4]

The SCDI bore substantial fruit during 2019. In March, the Commission brought settled actions against 79 advisers, who agreed to return more than \$125 million to clients, with a substantial majority going to retail investors, and in September, against an additional 16 advisers who agreed to disgorge \$10 million.[5] The Commission's orders found that the settling advisers violated Section 206(2) and (except with respect to state-registered only advisers) Section 207 of the Advisers Act, neither of which requires a showing of intent to defraud. In addition to disgorgement of the improperly disclosed fees, the settling advisers agreed to review and correct all relevant disclosure documents concerning mutual fund share class selection and 12b-1 fees and to evaluate whether existing clients should be moved to an available lower-cost share class and to move any such clients accordingly. With these settlements, the SCDI is now substantially complete.

The *Robare* Decision: Conflicts Must Be Disclosed Specifically

In addition to the portion of the opinion in *Robare Group, Ltd. v. SEC* narrowing the SEC's ability to charge investment advisers for materially inaccurate filings under Section 207 of the Advisers Act, discussed in Part 1 of this article, the case provided important judicial guidance on the level of specificity required for disclosure of investment adviser conflicts. The District of Columbia Circuit affirmed the governing principle that the Advisers Act requires investment advisers "to disclose known conflicts of interest … in a manner that would enable their clients to understand the source and nature of the conflicts."[6] The Court found that the adviser in that case had failed to meet this standard with respect to a revenue-sharing agreement with Fidelity, which the adviser used for execution, custody and clearing, when its clients invested in certain "eligible funds" offered on Fidelity's online platform. The problem, the Court found, was that the adviser's Form ADV initially disclosed to investors only that it "may" receive "selling compensation" through the "facilitation of certain securities transactions."[7] That language, in the Court's view, neither disclosed that the adviser received payments from Fidelity nor the conflict of interest that those payments created.

The adviser later revised its Form ADV to identify Fidelity specifically, as well as the asset class for which it received compensation, disclosing that Fidelity "has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity." This language, too, the Court found, was inadequate, because it "failed to mention that not all 'no transaction fee mutual fund assets in custody with Fidelity' resulted in payments" to the adviser, and therefore, that the adviser "had an economic incentive to put client assets into eligible non-Fidelity, non-transaction fee funds over other funds available on the Fidelity platform."[8] Moreover, the Court determined that the adviser's failure to meet its fiduciary obligation and its negligence in failing to disclose the conflict were so clear that expert testimony on the relevant standard of care and on practices in the industry was unnecessary.[9]

Interpretive Guidance on Disclosure of Conflicts

Following *Robare*, as part of its June 2019 package that included Regulation BI (*see* Part 1 of this article), the SEC issued important interpretive guidance intended to clarify the standard of conduct—and in particular, the requisite disclosure of conflicts—for investment advisers. That guidance became effective on July 12, 2019. Although produced by the SEC's Division of Investment Management, not Enforcement, that guidance will inform OCIE's and Enforcement's analysis of conflicts of interest and disclosure thereof.[10] Moreover, because the Division of Investment Management reviews Enforcement's recommendations to the Commission to bring enforcement actions under the Advisers Act, it will have an impact on the scope of Section 206 cases that the SEC brings going forward.

The guidance focuses on an adviser's fiduciary obligation to make "full and fair disclosure" to clients of all material facts, particularly conflicts of interest, relating to the advisory relationship, and makes some useful points about when disclosure will be deemed "full and fair":

- Disclosure "should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent." For example, "it would be inadequate to disclose that the adviser has 'other clients' without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has 'conflicts' without further description."
- Expressly taking the position that the *Robare* Court suggested, the guidance clarifies that a disclosure that an adviser "may" have a particular conflict, without more, "is not adequate when the conflict actually exists."
- Full and fair disclosure to an institutional client may differ significantly than to a retail client because "institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications."
- In cases where complex or extensive conflicts make it impossible to provide disclosure to retail clients that is "sufficiently specific, but also understandable," an adviser should "either eliminate the conflict or adequately *mitigate* (that is, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible."

In light of *Robare* and the interpretive guidance, asset managers should be attentive to the precision of disclosures of existing conflicts. Hypothetical disclosures that such a conflict, whether arising from a revenue-sharing agreement or otherwise, "may" exist will fail to meet the adviser's disclosure obligation under Section 206 as construed by the SEC. Moreover, even disclosing the receipt of payments from a specified third party in connection with a specified product category will not suffice under either the DC Circuit's or the SEC's analysis where the adviser has an incentive to select particular assets within that category for reasons other than the interests of its client.

Heavy Enforcement Focus on Advisers for Failure to Disclose Conflicts

The Division of Enforcement in 2019 repeatedly took aim at investment advisers for alleged failure to disclose conflicts, and Enforcement has indicated that it will remain focused on the issue for the foreseeable future, with a particular emphasis on revenue-sharing arrangements, cash sweep programs, and fee structures for client investments in unit investment trusts (UITs).[11] The cases filed last year tended to be brought as settled administrative proceedings and to involve charges under Sections 206(2) and 206(4) of the Advisers Act,[12] which require only a showing of negligence, rather than intent to defraud, and Rule 206(4)-7, which requires advisers to adopt policies and procedures reasonably designed to prevent violations of the Act.[13] Some of the noteworthy filed actions involving disclosure of conflicts included:

- A settled administrative proceeding charging intentional fraud against Massachusetts-based Fieldstone Financial Management Group and its principal, resulting in their agreement to pay, jointly and severally, disgorgement and prejudgment interest of over $1 million and a penalty of $275,000, along with a permanent collateral industry bar, for failing to disclose conflicts of interest related to their recommendations to clients to invest in securities issued by an affiliate of a Fieldstone creditor and for misleading clients about the firm's relationship with that creditor.[14]
- A federal court action against Commonwealth Equity Services, a Massachusetts-based dually-registered investment adviser and broker-dealer, in connection with its alleged failure to disclose conflicts arising from a revenue-sharing agreement with the clearing firm it required most of its clients to use for trades in their accounts.[15] According to the complaint, Commonwealth disclosed that it would receive revenue sharing for investments in a "no transaction fee" program offered by the clearing firm, but did not disclose, among other things, that in some instances lower-cost shares were available under the program for which Commonwealth received less or no revenue sharing.
- A settled administrative proceeding against two subsidiaries of Prudential Financial Inc., which agreed to disgorge over $27 million and pay a $5 million penalty for their failure to disclose conflicts of interest in connection with the recall of securities on loan from the insurance-dedicated mutual funds the subsidiaries advised in order to allow Prudential to receive certain tax benefits.[16] The recall deprived the funds of approximately $72 million in revenue from lending the securities that they would have received, plus investment income thereon, had the recall not happened.
- A settled administrative proceeding against two BMO adviser entities, which agreed to pay disgorgement of $25 million, prejudgment interest of over $4.7 million and a penalty of $8.25 million to settle charges that they failed to disclose to clients that they gave preference to their Proprietary Mutual Funds, resulting in additional management fees through revenue-sharing agreements and violating BMO's duty under Advisers Act Section 206 to seek best execution for clients.[17]

- A settled administrative proceeding against Salt Lake City-based Lefavi Wealth Management, which agreed to pay disgorgement of nearly \$1 million plus prejudgment interest and a \$150,000 penalty in connection with its alleged failure to disclose the conflict arising from its recommendations to clients to invest in a variety of alternative investments at a share price that included a seven percent commission, resulting in additional compensation to Lefavi, when other, cheaper investments were available without an embedded commission.[18]

Improper Valuation of Fund Assets

The Division of Enforcement has brought a now long line of valuation cases against investment advisers, and valuation continued to be an Enforcement priority in 2019. Those actions generally have focused on (1) inaccurate valuation of fund assets, and (2) inadequate policies and procedures to ensure proper valuation. The SEC made explicit in one of its orders last year its view that valuation is a "critically important area for investment advisers" because it can adversely affect fund operations and potentially lead to over- or underpayment of withdrawal proceeds, incorrect calculation of fees and inaccurate performance reporting.[19] Among its significant valuation cases in fiscal year 2019 were the following:

- A settled action against Colorado-based private fund manager Deer Park Road Management and its chief investment officer based on Deer Park's failure to value assets in accordance with Generally Accepted Accounting Principles, or GAAP, resulting in a \$5 million penalty against Deer Park and a \$250,000 penalty against the CIO.[20] Whereas the SEC's valuation cases typically have involved asset managers who overvalue their portfolios in order to maximize fees or exaggerate fund performance, here, the SEC alleged that Deer Park's compliance failures caused it to *undervalue* residential mortgage-backed securities in its flagship fund in an apparent desire to smooth the fund's profit and loss figures.[21] The SEC found especially problematic Deer Park's extensive use of models that gave traders, under the CIO's supervision, discretion to value assets without taking sufficient account of external pricing data, a practice it viewed as inconsistent with Accounting Standards Codification 820. Moreover, the SEC found that Deer Park's Risk Management Committee, which oversaw the fund's compliance with its valuation policy, was not competent for the task; it consisted of two relatives of the CEO and the firm's CFO, none of whom had prior experience in bond valuation.
- A settled administrative proceeding against Fifth Street Management LLC, a Greenwich, Connecticut-based adviser to business development company (BDC) clients for allegedly failing to conduct in a reasonable manner the quality control review of a BDC's quarterly valuation models for illiquid assets and improperly allocating expenses to clients, for which Fifth Street agreed to pay disgorgement and prejudgment interest of approximately \$2.3 million and a civil penalty of \$1.65 million.[22] As alleged in the order, Fifth Street did not implement written policies and procedures for the quarterly valuation reviews, and some its personnel involved in valuation did not understand the level of review required in the quality control process, and failed to flag incorrect or unreasonable valuation model inputs for certain of the BDC's investments.
- A federal court action against SBB Research Group, a Chicago-area adviser to a series of private funds, as well as its CEO and COO for an alleged multi-year scheme to inflate fund values.[23] According to the complaint, the defendants, seeking to gain credibility for what was originally a vehicle for investing family funds from the CEO's college dorm room, intentionally rigged SBB's valuation model to

inflate the recorded value of the funds' securities, which consisted almost exclusively of structured notes. The alleged scheme resulted in approximately $1.4 million in improperly charged fees.

Improper Fees and Expenses

Enforcement has long been focused on investment advisers who charge fees or misallocate expenses to clients that are undisclosed or inconsistent with their advisory agreements, policies and procedures and/or Forms ADV. As noted above, OCIE flagged this issue as one of its examination priorities for 2019. It is therefore little surprise that several of the cases that the SEC filed in fiscal 2019 involved this issue. Among those filed actions are:

- A settled administrative proceeding against Raymond James & Associates and two subsidiaries—an investment advisor and a broker-dealer—arising from improper advisory fee charges on inactive retail accounts and excess commissions for unsuitable brokerage customer investments in certain UITs. The three entities agreed to disgorgement of approximately $12 million and a $3 million penalty.[24] According to the order, the advisor failed, contrary to its representation in its Form ADV, to review 7,708 inactive accounts, which paid the adviser approximately $4.9 million in advisory fees, and used incorrect UIT valuations to calculate management fees for certain clients, resulting in roughly $51,000 in excess fees.
- In a case especially rife with alleged conflicts, the SEC filed a settled administrative proceeding against Yucaipa Master Manager, a private equity fund manager based in Los Angeles, for alleged misallocation to its client funds of employee salary expenses and consultants' fees in violation of the governing Limited Partnership Agreement (LPA), as well as failure to disclose several conflicts of interest, including a personal loan from Yucaipa's principal to a consultant who did work for the funds. Yucaipa agreed to pay disgorgement and prejudgment interest of approximately $2 million and a $1 million penalty.[25]
- A settled administrative proceeding against NB Alternatives Advisers LLC (NBAA), a Dallas-based private equity fund adviser to three private equity funds sponsored by NBAA and its Neuberger affiliates, for improper allocation of $2 million of compensation-related expenses to the funds, contrary to the governing LPA.[26] NBAA agreed to disgorgement and prejudgment interest of approximately $2.3 million and a $375,000 penalty, an amount the SEC deemed appropriate in light of NBAA's voluntary remediation and cooperation during the SEC Staff's investigation.

Digital Assets and Cybersecurity Remain Enforcement Priorities

The Enforcement Division's close focus on the sale of digital assets and the security of data against cyber threats, largely through the work of its Cyber Unit, continued in 2019. In fiscal 2019, the SEC filed 26 cyber enforcement actions against sellers of digital assets, participants in a global hacking and insider trading scheme, and regulated entities for insufficient cybersecurity controls.[27]

Digital Assets/Initial Coin Offerings

The SEC continued to charge issuers engaging in unregistered initial coin offerings (ICOs) in cases where it determined that the assets qualified as securities under the test devised by the Supreme Court in 1946 in *SEC v. W. J. Howey Co.* (the *Howey* test),[28] and hence, were subject to the registration requirements of Section 5 of the Securities Act of 1933. These cases follow the Division of Enforcement's warning in its 2017 DAO Report of Investigation under Section 21(a) of the Exchange Act that digital assets, including tokens, may qualify as securities.[29]

(Enforcement issues 21(a) reports when it believes that publication of its investigative findings is a more effective means of enforcement than bringing charges.)

Whereas its earlier ICO cases tended to involve fraud or other misconduct (for example, the buzz-worthy actions filed in 2018 against DJ Khaled and Floyd Mayweather for touting ICOs on social media without disclosing that they were paid by the issuers),[30] Enforcement has more recently signaled its intent to pursue these cases based on failure to register the offering alone. Those cases have set out a "path to compliance" for issuers in violation of Section 5 by laying out a framework for future settlements, whereby the settling ICO issuers agree to rescission of investors' purchases of tokens under the illegal offerings, notify investors of their right to rescind, register their tokens with the Commission under Section 12(g) of the Exchange Act, and comply with applicable registration and reporting requirements.[31] Significantly, two of the ICO enforcement actions in 2019 were not brought as settled administrative proceedings, but rather, as contested litigations in federal court. One of those cases is still being actively litigated and may provide judicial guidance on the status of digital assets under the securities laws.

The framework for settlement was incorporated in two settlements with ICO issuers in late 2018, Carrier EQ Inc. (Airfox) and Paragon Coin Inc., which raised approximately $15 million and $12 million, respectively, in unregistered ICOs, for which both agreed to pay a $250,000 penalty.[32] In February 2019, the SEC brought its first action against an ICO issuer that self-reported its violations, Gladius Network LLC, and notably, imposed no penalty, as it did in its prior cases against issuers who did not self-report.[33] According to the order, Gladius conducted an unregistered ICO offering in late 2017, raising approximately $12.7 million in digital assets to finance its plan to develop a network for renting spare computer bandwidth to defend against cyberattacks and enhance delivery speed.[34] The company self-reported to Enforcement Staff in the summer of 2018, expressed an interest in taking prompt remedial steps, and cooperated with the SEC's investigation. Because the company self-reported, agreed to compensate investors and to register the tokens as a class of securities, the SEC did not impose a penalty. Robert Cohen, the then Chief of the Cyber Unit, pointed to the *Gladius* action as an indicator of "the benefit of self-reporting and taking proactive steps to remediate unregistered offerings."[35]

In June, the Enforcement Division brought a federal court action against Kik Interactive, Inc. for conducting an unregistered offering of $100 million of digital tokens.[36] As alleged in the complaint, in 2017, Kik shifted its business from a focus on an online messaging application to a new strategy based on the sale of a digital currency known as "Kin," and ultimately sold $55 million of Kin tokens to US investors. Kik allegedly marketed the Kin tokens as an investment opportunity, claiming, among other things, that Kik would incorporate the tokens into its messaging app to create a new Kin transaction service and incentivize other companies that adopted Kin to spur demand for them. The SEC contends that the company's claims that investors could expect profits from its efforts to create a digital ecosystem indicated that they qualify as securities for purposes of Section 5. In its answer, however, Kik disputes that Kin qualified as an "investment contract" or other form of security under *Howey*.[37] Both Enforcement and the defense bar will doubtless be watching this case closely. Assuming the court has an opportunity to rule on the issue, the *Kik* action could shed some light on the application of *Howey* to digital assets.

In another litigated action filed in September, the SEC filed its first federal court suit alleging both failure to register an ICO as well as unregistered broker-dealer activity. According to the complaint filed against ICOBox and its founder in the US District Court for the Central District of California, ICOBox raised funds in 2017 to develop a platform for ICOs by selling roughly $14.6 million of "ICOS" tokens to over 2,000 investors in an unregistered offering.[38] Although the company allegedly claimed that the tokens would increase in value upon trading and that token holders would be able to swap them at a discount for other tokens promoted on the ICOBox platform, the ICOS tokens, the SEC alleges, turned out to be virtually worthless. In addition, the SEC charged ICOBox with acting as a broker by facilitating ICOs that raised more than $650 million for dozens of clients, but failing to register as a broker under the Exchange Act. The complaint alleges violations of Sections 5(a) and 5(c) of the Act for the unregistered offering and Section 15(a) of the Exchange Act for the unregistered brokerage activity, and seeks injunctive relief, disgorgement and penalties. The defendants as of this writing have not answered the complaint, and in October, the court granted the SEC's motion for entry of default against them.

Cybersecurity: The SEC Warns Issuers, Investment Advisers, and Broker-Dealers About Compliance Obligations and Failures

As in 2018, data security remained at the top of the SEC's enforcement agenda. The Division of Enforcement issued a warning to public companies at the start of fiscal year 2019 in a Section 21(a) report about the need to take into account cyber threats in their design of internal accounting controls.[39] The investigations on which the report was based focused on nine issuers victimized by "business email compromises," in which company personnel received spoofed or otherwise compromised emails purporting to be from a company executive or vendor, leading the personnel to wire large sums of money or pay invoices to accounts controlled by the perpetrators. The report notes that the issuers all had in place procedures that required verification for payment requests, yet still fell victim to the cyberattacks, underscoring, in the SEC's view, the "critical role training plays in implementing controls that serve their purpose and protect assets in compliance with the federal securities laws." In order to meet their requirements under Section 13(b)(2)(B) to maintain adequate accounting controls, the SEC emphasized, issuers "must calibrate their internal accounting controls to the current risk environment and assess and adjust policies and procedures accordingly."

The SEC in 2019 also emphasized the need for investment advisers and broker-dealers to implement adequate policies and procedures to ensure the safeguarding of customer data. The Division of Enforcement has indicated its determination to pursue regulated entities who fail to meet this obligation, as it did in its 2018 action against Voya Financial Advisors Inc.[40] The *Voya* case involved violations of the Safeguards Rule (Rule 30(a) of Regulation S-P), which, among other things, requires every broker-dealer and investment adviser registered with the SEC to provide written notice to customers concerning its privacy policies and to adopt written policies and procedures that address safeguards for the protection of customer records and information, as well as the Identity Theft Red Flags Rule (Rule 201 of Regulation S-ID), which requires registered broker-dealers and investment advisers to develop and implement a written Identity Theft Prevention Program designed to protect, prevent and mitigate identity theft in connection with the opening of certain covered accounts.

In April 2019, OCIE issued a Risk Alert flagging several issues concerning compliance with Regulation S-P that it found in the course of recent examinations of investment advisers and broker-dealers. These included: (1) failure to provide accurate Initial Privacy Notices, Annual Privacy Notices and Opt-Out Notices to customers; (2) lack of written policies and procedures as required by the Safeguards Rule; and (3) policies not implemented or reasonably designed to safeguard customer records and information, specifically with respect to personal devices, electronic communications, training and monitoring, unsecure networks, outside vendors, PII inventory, incident response plans, unsecure physical locations, login credentials and departed employees.[41] In light of the Risk Alert, further SEC actions to enforce Regulation S-P can be expected, as OCIE frequently works in partnership with the Division of Enforcement, and its Risk Alerts often serve as portents of enforcement activity to follow.

Cybersecurity Enforcement Actions

With respect to enforcement actions, the SEC filed a remarkable case in 2019 that involved the theft of non-public data from the SEC itself. In *SEC v. Ieremenko*, the SEC charged nine defendants, including a Ukraine-based hacker, in an international scheme to hack into the SEC's EDGAR database during 2016 and extract "test filings" containing at least 157 earnings releases and other non-public information of publicly traded companies.[42] The US Attorney's Office for the District of New Jersey brought parallel criminal charges. After obtaining the earnings data, the complaint alleges, the hacker passed the information on to six individuals and two entities in several countries who used it to trade in the narrow window between the illegal extraction of the files from SEC systems and the release of that information to the public. In total, the alleged scheme reaped over $4.1 million in profits.[43] (The hacker and some of the traders in *Ieremenko* also were involved in an earlier scheme to hack material non-public information from several newswire services.[44]) The SEC brought fraud charges against all defendants under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act.

The case highlights Enforcement's enhanced use of data analytics to review massive amounts of trading data to detect fraud. Here, market and trading specialists, using both in-house and outside vendor technology, were able to identify suspicious trading in advance of more than 150 announcements, while economists in the SEC's Division of Economic Research and Analysis determined the very long odds—ranging from 7 in 10 million to less than 1 in 1 trillion—that the defendants would have randomly chosen to trade in front of those events. Moreover, the SEC's IT Forensics Lab analyzed IP addresses to pin down the connections among seemingly unrelated scheme participants. Co-Director Peikin acknowledged that the case, "quite frankly, might not have been possible a few years ago due to the geographical dispersal and technological sophistication of the perpetrators."[45]

The SEC also brought two notable cases against regulated entities for violations of Regulation Systems Compliance and Integrity (SCI),[46] which requires self-regulatory organizations (including stock and options exchanges, clearing agencies, FINRA and the Municipal Securities Rulemaking Board), certain alternative trading systems, and other entities, *inter alia*, to establish written policies and procedures to effectuate the goals of the Rule, take corrective action and notify the SEC with respect to systems disruptions and security breaches, and conduct regular reviews of their systems.[47] The SEC found that Options Clearing Corporation, the sole registered clearing agency for exchange-listed options contracts on equities, failed to comply with Regulation SCI through its failure to establish and enforce the required policies and procedures, resulting in its agreement to pay a $15 million penalty to the SEC and $5 million to the CFTC. The Commission shortly thereafter brought a settled action against Virtu Americas LLC (f/k/a KCG Americas LLC), which operated as a dark pool using an automated system that was intended to keep trading volume from reaching the threshold at which it would be subject to Regulation SCI. The system did not function as intended, allowing trading volume to rise above the threshold, but Virtu did not comply with the requirements of the rule once triggered, leading to its agreement to pay a $1.5 million penalty.

Issuer Disclosure

In another case against a high-profile issuer, the SEC brought a settled federal court action against Facebook, which agreed to a $100 million penalty for allegedly misrepresenting the risk of misuse of its users' data as hypothetical, even though it knew that a researcher had improperly sold information about tens of millions of Facebook users to Cambridge Analytica for the purpose of targeting advertising at US voters.[48] Since its 2012 IPO, the risk factors in Facebook's public filings warned investors generally about the potential for misuse of its users' data by developers and the possible financial consequences to its business from such misuse. According to the complaint, following a December 2015 report in the *Guardian* about the sale of user data to Cambridge Analytica, Facebook learned that the sale, which violated its Platform Policy, had in fact occurred. The company, the SEC alleges, nevertheless continued to make only hypothetical risk disclosures concerning misuse of data, and its communications group publicly denied that the company's investigation had revealed any wrongdoing. Only in March 2018, after *The New York Times* and *Guardian* told Facebook that they planned to run stories about the improper data transfer, did Facebook disclose the incident. Though not a case involving a breach of its systems as in the *Ieremenko* case against the members of the EDGAR hacking scheme or last year's action against the entity formerly known as Yahoo!,[49] the Facebook case underscores the SEC's continuing commitment to pursue cases against issuers who fail to disclose fully and candidly the improper access or use of customer or user data.

Public Company Accounting and Disclosure Remain an Enforcement Mainstay

The Division of Enforcement, in large part through the work of its Financial Reporting and Audit (FRAud) Group, continued its longstanding focus on issuer disclosure and audit and accounting matters, filing 92 such standalone cases in fiscal 2019, as compared to 79 in 2018.[50] As in the past, the SEC's cases in this area were focused on financial reporting, disclosures concerning business operations, and auditor independence. The following is an illustrative list of some of the significant filed actions in this area in fiscal 2019.[51]

SEC v. Mylan: A Cautionary Tale for Issuers Facing Government Investigations

Public companies faced with government investigations are routinely called on to determine the point in time at which it becomes necessary to disclose the existence of those investigations and the potential financial loss that may result from them. The SEC's action against the pharmaceutical company Mylan N.V. last year illustrates the high stakes involved in that analysis. In a settled federal court action, the company agreed to a $30 million penalty for its alleged failure to disclose or accrue a loss for the Department of Justice's (DOJ) civil investigation into whether the company overcharged Medicaid for its EpiPen.[52] According to the SEC's complaint, the DOJ investigation arose out of Mylan's classification of the EpiPen as a "generic" drug under the Medicaid Drug Rebate Program, allowing Mylan to pay significantly lower rebates to the government than it would had it classified EpiPen as a "branded" drug.[53] The DOJ's investigation began in late 2014 and continued for nearly two years, during which the DOJ issued multiple subpoenas and investigative demands, rejected Mylan's request to close the investigation and indicated its intent to sue if Mylan did not make a settlement offer. In response, Mylan provided potential damages calculations and made offers of settlement. Mylan did not disclose the investigation until October 2016, when it announced a $465 million settlement with the DOJ. In waiting until that point, the SEC alleged, Mylan ran afoul of ASC 450, which requires an issuer to disclose a material loss contingency if the loss is at least "reasonably possible," and to record an accrual for the estimated loss if the loss is "probable" and reasonably estimable. Here, the complaint alleges, Mylan knew or reasonably should have known by the filing of its Form 10-Q for the third quarter of 2015 that a material loss relating to the EpiPen classification and DOJ investigation was reasonably possible, and by the filing of its Form 10-Q for the second quarter of 2016 that a material loss was probable.

In addition, the SEC claimed, Mylan's risk factor disclosures in its annual reports on Form 10-K for 2014 and 2015 were materially misleading because they disclosed only that "a governmental authority may take a position contrary to a position we have taken" with respect to payments to Medicaid, and "[w]e cannot assure you that our submissions will not be found by [the government] … to be … incorrect." This "hypothetical phrasing," according to the Commission, created the false impression that the government had not taken a position on the EpiPen classification, when the company knew otherwise by October 2014. The *Mylan* decision has drawn criticism from the defense bar for failing to provide public companies with a sufficiently clear standard and potentially forcing them to disclose investigations and potential losses prematurely, but for now, the case forces them to strike the difficult balance between the SEC's demand for prompt and clear disclosure against the financial and reputational detriment that may result.

Other Issuers Targeted for Financial Reporting

Apart from *Mylan*, the SEC filed several other notable financial reporting cases against issuers in fiscal 2019, including a series of settled administrative proceedings against four public companies for failing to maintain internal control over financial reporting (ICFR) for seven to ten consecutive annual reporting periods.[54] As alleged by the Commission, although the companies disclosed material weaknesses in ICFR year after year concerning certain high-risk portions of their financial statement disclosures, they each took several months, or years, to remediate those weaknesses after the SEC Staff addressed them. Each of the issuers consented to a penalty ranging from $35,000 to $200,000, and one agreed to retain an independent consultant. The takeaway from these cases is that a company cannot simply disclose the existence of ICFR failures; it must also promptly fix them.

Adding to the highly-publicized legal troubles of Nissan and its former CEO, the Commission filed a settled administrative proceeding against the company, the former CEO and a former director for an alleged scheme to conceal more than $90 million of compensation to the former CEO, while also increasing the CEO's retirement allowance by more than $50 million without disclosure to investors, resulting in a $15 million penalty against Nissan, a $1 million penalty and a 10-year officer and director bar against the former CEO, and a $100,000 penalty and five-year officer and director bar against the former director.[55]

In a settled action notable for the fact that the issuer paid neither a penalty nor disgorgement, the SEC charged PPG Industries, a Pittsburgh-based paint manufacturer, with failure to properly record various expense accruals and misclassification of certain income as from continuing operations for nearly a year and a half, causing a 2018 restatement, which disclosed 14 instances of accounting misconduct and reduced PPG's pre-tax income from continuing operations by a cumulative $6 million for 2016 and 2017.[56] The order credited PPG for prompt self-reporting to the Commission, disclosure of the alleged misconduct to investors, cooperation with the SEC Staff's investigation, and remedial measures, including disciplining employees in the finance division, organizational changes and enhanced training and policies and procedures.

Disclosures Regarding Business Operations

The SEC filed a disclosure case in federal court against Volkswagen, two of its subsidiaries, and its former CEO in connection with the much-publicized "clean diesel" scandal involving the company's misrepresentations and omissions about emissions from its diesel automobiles.[57] The complaint alleges that during 2014 and 2015, Volkswagen issued over $13 million in bonds and asset-backed securities in the United States at a time when senior executives knew that more than half a million of the company's vehicles in the United States grossly exceeded legal emissions limits. Also, according to the SEC, Volkswagen made false and misleading statements to investors about vehicle quality, environmental compliance and the condition of the company's finances.

In another case against a major auto manufacturer, the Commission filed a settled administrative proceeding action FCA US LLC and its parent, Fiat Chrysler Automobiles, N.V., for allegedly inflating auto sales activity in a series of misleading press releases between 2012 and 2016.[58] According to the order, FCA US issued monthly press releases that falsely reported new vehicle sales and touted a "streak" of uninterrupted monthly sales growth, when in fact, that streak had come to an end in 2013. The SEC also found that FCA US inflated new vehicle sales results by paying dealers to report fake vehicle sales and maintaining a database of actual but unreported sales, which employees referred to as a "cookie jar." FCA agreed to a $40 million penalty.

The multi-level marketing company Herbalife Nutrition Ltd. agreed to pay a $20 million penalty to settle charges that it made false and misleading statements about its business model in China in its periodic filings in the United States between 2012 and 2018.[59] The SEC found that Herbalife falsely represented that multi-level marketing (a structure under which workers are incentivized to enlist new sellers by giving them a portion of downstream sales) is not permitted in China, but that direct selling is permitted there, and that to comply with Chinese law, it paid its distributors based on hours worked. In fact, the company's operations in China followed the multi-level marketing model it used in every other country where it operates.

Auditor Independence

In February 2019, the SEC brought settled charges against Deloitte Touche Tohmatsu LLC (Deloitte Japan), its former CEO and former Reputation and Risk Leader and Director of Independence as the result of Deloitte Japan's alleged preparation of audit reports for a client, even though dozens of the auditor's employees maintained bank accounts with a subsidiary of the client with balances that exceeded the amount insured by the Deposit Insurance Corporation of Japan.[60] Deloitte Japan agreed to disgorgement and prejudgment interest of over $1.1 million and a penalty of $880,000.

The SEC also charged PricewaterhouseCoopers LLP (PwC) for alleged violation of the auditor independence rules between 2013 and 2016 in connection with 19 engagements for 15 SEC-registrant issuers, including one client for which PwC provided non-audit services such as designing software for the client's financial reporting. PwC agreed to pay disgorgement of approximately $3.8 million plus prejudgment interest of over $613,000 and a $3.5 million penalty. The Commission also charged a PwC partner for causing those violations.[61]

Municipal Securities Remain an Enforcement Concern

The SEC's prioritization of retail investors has lent continued impetus to the agency in targeting misconduct involving municipal securities, which, as SEC Chairman Jay Clayton has emphasized, remain concentrated in the hands of retail investors, with individuals, either directly or through mutual funds, holding over 66 percent of the $3.853 trillion in principal outstanding.[62] Accordingly, the Division of Enforcement's Public Finance Abuse Unit has set its sights in recent years on municipal issuers, investment advisers, and broker-dealers, and 2019 was no exception. Among the noteworthy actions that the Division brought in this space are:

- A federal court action against a municipal securities advisor and its principal for allegedly breaching their fiduciary duties in connection with a $6 million bond offering by a public library in Illinois.[63] The library district had hired the advisor to provide advice on the selection of an experienced underwriter and the pricing of the bonds, but, the complaint alleges, the adviser provided no such advice. As a result, the bonds were allegedly mispriced, causing the district to pay an additional $500,000 in interest over the life of the bonds.

- A settled administrative proceeding against Morgan Stanley Smith Barney for allegedly recommending 135 unsuitable transactions to retail customers, namely, swaps in which the customers sold one municipal bond while purchasing another nearly identical bond, with no apparent economic benefit to the customers.[64] The SEC found violations of Section 15B(c)(1) of the Exchange Act, for which Morgan Stanley agreed to pay a $225,000 penalty. The firm also returned the over $340,000, with interest, in commissions and fees charged to customers upon execution of the swaps.
- A settled administrative proceeding against a former Wells Fargo Clearing Services trader, who agreed to a $25,000 penalty, in connection with an alleged scheme to acquire municipal bonds for Wells Fargo ahead of retail investors, whom municipal issuers commonly require underwriters to prioritize over all other orders.[65] The trader submitted orders purporting to be from retail investors in at least 16 primary offerings of municipal bonds, receiving allocations in 15.

The FCPA Remains a Focus

Though a relatively small portion of the Enforcement program in terms of number of filed actions, constituting 3 percent of the Division's standalone cases in both 2018 and 2019, the Division of Enforcement's FCPA activity in 2019 resulted in some notably large penalties. As in recent years, the SEC's enforcement actions in this area were frequently based not on allegations of bribery, but rather, on violations of the FCPA's internal controls and/or books-and-records provisions, an approach that has engendered substantial criticism.[66] The FCPA is likely to remain in focus, as both the Chairman and one of the Co-Directors of Enforcement have flagged these cases as a continuing Enforcement priority.[67] The SEC brought 18 such cases in fiscal 2019, five more than in 2018.[68] Among the most notable were:[69]

- A settled administrative proceeding against Mobile TeleSystems PJSC (MTS) for bribes paid to win business in Uzbekistan. The case involves one of the largest corporate FCPA settlements to date, with MTS agreeing to pay a $100 million penalty in the SEC settlement and a criminal fine and forfeiture totaling $750 million in connection with its guilty plea in the parallel DOJ action.[70] According to the order, MTS paid at least $420 million to an Uzbek government official to secure business, generating more than $4.2 million for the company, thereby violating Exchange Act Sections 30A and 13(b)(2).[71]
- A settled administrative proceeding against Walmart, in which the company agreed to pay more than $144 million to resolve the SEC's charges and approximately $138 million to resolve parallel criminal charges by the DOJ.[72] The SEC did not bring charges based on any corrupt payments, but rather, for books and records and internal controls violations. According to the order, between 2000 and 2011, Walmart's subsidiaries in Brazil, China, India, and Mexico operated without a system of sufficient anti-corruption controls, causing them to pay third-party intermediaries without reasonable assurances that certain transactions were consistent with their stated purpose or with the FCPA.[73] Moreover, according to the SEC's order, when Walmart learned of anti-corruption risks in those countries, it did not sufficiently investigate or mitigate them.
- Settled administrative proceedings against Deutsche Bank and Barclays PLC, respectively, arising from charges that each violated the FCPA by hiring friends and/or relatives of officials in the Asia Pacific region and Russia.[74] The SEC's

order against Deutsche Bank found that the firm engaged in corrupt hiring between 2006 and 2014 despite internal policies and procedures in the Asia Pacific region designed to prevent such activity, which the SEC found were inadequately enforced. The order against Barclays found that the bank had no such internal accounting controls. Charged with violations of Section 13(b), Deutsche Bank agreed to pay disgorgement of over $10 million, prejudgment interest of nearly $2.4 million and a $3 million penalty, while Barclays agreed to pay disgorgement of over $3.8 million, prejudgment interest of over $980,000 and a $1.5 million penalty. The SEC credited both for their cooperation and remediation.

Conclusion

Under the rubric of Main Street investor protection, the SEC made its enforcement priorities unmistakably clear in 2019. Investment advisors will remain under close scrutiny for the foreseeable future, and there will be continued intense enforcement activity focused on disclosure of conflicts, valuation and fees and expenses. Enforcement also will maintain its close watch on issuers of digital assets and on advisers, broker-dealers and public companies with respect to cybersecurity. At the same time, the Division will continue to pursue investigations in areas that have long been important components of its program, including insider trading, public company disclosure, municipal securities, and FCPA matters. The lifting of the SEC's hiring freeze and its ramped-up capabilities in data analytics can be expected to provide additional vigor to Enforcement's pursuit of these cases.

We will in all likelihood see further manifestations of the political and ideological division that was evident among the Commissioners in 2019. While those disputes may impact facets of enforcement such as the scope of broker-dealers' and investment advisers' duties to clients or the amount of whistleblower awards, they are unlikely to alter the by now firmly established focus areas that the Division of Enforcement has defined. A far more pressing concern in the coming year will be the significant challenges to the SEC's authority, none more so than the threat to its disgorgement power. 2020, therefore, will no doubt provide further clarity as to the SEC's ability to execute its enforcement priorities.

Ms. Wood and **Mr. Murray** are partners, and **Mr. Garcia** is an associate, with Foley Hoag LLP.

NOTES

1 Remedies available to the Commission in administrative proceedings include cease-and-desist orders, censures, suspension or revocation of registration, as well as civil monetary penalties and disgorgement.

2 *2019 Examination Priorities*, SEC Office of Compliance Inspections and Examinations, pp. 6-7, available at *https://www.sec.gov/files/OCIE%20 2019%20Priorities.pdf*. In particular, OCIE is focused on whether fees charged to advisory accounts "are assessed in accordance with the client agreements and firm disclosures, and will remain focused on financial incentives that may influence the selection of particular share classes." The Office also plans to scrutinize advisers who participate in wrap fee programs, which charge investors a single bundled fee for both advisory and brokerage services. As to conflicts of interest, OCIE intends to examine closely the use of affiliated service providers and products, securities-based non-purpose loans and lines of credit, which allow borrowers to use the securities in their advisory accounts as collateral to obtain a loan, and borrowing funds from clients.

3 Risk Alert, "Overview of the Most Frequent Advisory Fee and Expense Compliance Issues Identified in Examinations of Investment Advisers," (April 12, 2018), available at *https://www.sec.gov/files/ocie-risk-alert-advisory-fee-expense-compliance.pdf*.

4 Co-Director Steven Peikin, "Keynote Speech at Southeastern Securities Conference 2019," Sept. 6, 2019, available at *www.sec.gov/news/speech/*

peikin-keynote-speech-southeastern-securities-conference-2019.

[5] Press Release 2019-28, "SEC Share Class Initiative Returning More Than $125 Million to Investors," (Mar. 11, 2019), available at *www.sec.gov/news/press-release/2019-28*; Press Release 2019-200, "SEC Orders an Additional 16 Self-Reporting Advisory Firms to Pay Nearly $10 Million to Investors," (Sept. 30, 2019), available at *www.sec.gov/news/press-release/2019-200*.

[6] Robare Group., Ltd. v. SEC, 922 F.3d 468, 477 (D.C. Cir. 2019).

[7] *Id*. at 475-476.

[8] *Id*. at 476 (*quoting* Commission order below).

[9] *Id*. at 478.

[10] 17 CFR Part 276, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019). The June package also included a new Form CRS Relationship Summary, which investment advisers and broker-dealers are required to provide to retail investors at the start of their relationship, as well as guidance on the line under the Advisers Act between acting as a broker-dealer and an investment adviser. 17 CFR Part 276, *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, Release No. IA-5249 (June 5, 2019).

[11] Co-Director Stephanie Avakian, "Keynote Remarks at the 2019 SEC Regulation Outside the United States Conference," Nov. 5, 2019, available at *www.sec.gov/news/speech/speech-avakian-2019-11-05*.

[12] Section 206 of the Advisers Act provides:

It shall be unlawful for any investment adviser by use of the mails or any instrumentality of interstate commerce, directly or indirectly—

1. to employ any device, scheme, or artifice to defraud any client or prospective client;
2. to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
3. acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as a broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or
4. to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6.

[13] 17 CFR 275.206(4)-7.

[14] Press Release 2019-115, "SEC Charges Investment Adviser with Fraud," (July 1, 2019), available at www.sec.gov/news/press-release/2019-115; *Matter of Fieldstone Financial Management Group, No. 3-19227,* IAA Rel. No. 5263 (July 1, 2019).

[15] Litigation Release No. 24550, "SEC Charges Investment Adviser for Failing to Disclose Conflicts Arising from Receiving Revenue Sharing on Client Investments," (August 1, 2019), available at *www.sec.gov/litigation/litreleases/2019/lr24550.htm*; SEC v. Commonwealth Equity Servs. d/b/a Commonwealth Fin. Network, No. 1:19-cv-11655 (D. Mass. Aug. 1, 2019).

[16] Press Release 2019-176, "SEC Charges Prudential Subsidiaries for Misleading Funds They Advised, Generating Tens of Millions in Tax Benefits for Prudential," (Sept. 16, 2019), available at *www.sec.gov/news/press-release/2019-176*; *Matter of AST Investment Servs., Inc. and PGIM Investments LLC*, No. 3-19455, IAA Rel. No. 5346 (Sept. 16, 2019).

17 Press Release 2019-199, "Two BMO Advisory Firms Pay Over $37 Million to Harmed Clients for Failing to Disclose Conflicts of Interest," (Sept. 27, 2019), available at *www.sec.gov/news/press-release/2019-199*; *Matter of BMO Harris Financial Advisors, Inc. and BMO Asset Mgmt. Corp.,* No. 3-19545, IAA Rel. No. 5377 (Sept. 27, 2019).

18 Administrative Proceeding File No. 3-19411, "SEC Settles Charges Against Registered Investment Advisor for Failing to Disclose Conflicts of Interest," (September 3, 2019), available at *www.sec.gov/enforce/ia-5336-s; Matter of Lefavi Wealth Mgmt., Inc.,* No. 3-19411, IAA Rel. No. 5336 (Sept. 3, 2019).

19 *Matter of Deer Park Road Management Co., LP*, No. 3-19190, IAA Rel. No. 5245, at 2 (June 4, 2019).

20 Press Release 2019-86, "Hedge Fund Adviser to Pay $5 Million for Compliance Failures Related to Valuation of Fund Assets," (June 4, 2019), available at *www.sec.gov/news/press-release/2019-86*.

21 *Id.*

22 Administrative Proceeding File No. 3-18909, "Investment Adviser Settles Charges Related to Expense Misallocation and Valuation Review Failures," (Dec. 3, 2018), available at *www.sec.gov/enforce/33-10581-s*; *Matter of Fifth Street Mgmt., LLC,* No. 3-18909, Sec. Act. Rel. No. 10581 (Dec. 3, 2018).

23 Press Release 2019-201, "SEC Charges Hedge Fund Adviser and Top Executives With Fraud," (Sept. 30, 2019), available at *www.sec.gov/news/press-release/2019-201*; SEC v. SBB Research Group, LLC *et al.*, No. 19-cv-6473 (N.D. Ill. Sept. 30, 2019).

24 Press Release 2019-178, "Raymond James Agrees to Pay $15 Million for Improperly Charging Retail Advisors," (Sept. 17, 2019), available at *www.sec.gov/news/press-release/2019-178*; *Matter of Raymond James & Assocs., Inc., et al.*, No. 3-19464, Sec. Act. Rel. No. 10689 (Sept. 17, 2019).

25 Administrative Proceeding File No. 3-18930, "SEC Settles with Investment Adviser Who Failed to Disclose Conflicts of Interest and Misallocated Expenses," (Dec. 13, 2018), available at *www.sec.gov/enforce/ia-5074-s*; *Matter of Yucaipa Master Manager LLC*, No. 3-18930, IAA Rel. No. 5074 (Dec. 13, 2018).

26 Administrative Proceeding File No. 3-18935, "SEC Charges Private Equity Fund Adviser for Overcharging Expenses," (Dec. 17, 2018), available at *www.sec.gov/enforce/ia-5079-s*; *Matter of NB Alternatives Advisers, LLC*, No. 3-18935, IAA Rel. No. 5079 (Dec. 17, 2018).

27 *See* List of Cyber Enforcement Actions, *https://www.sec.gov/spotlight/cybersecurity-enforcement-actions.*

28 328 U.S. 293 (1946).

29 *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Exch. Act Rel. No. 81207, July 25, 2017, available at *https://www.sec.gov/litigation/investreport/34-81207.pdf.*

30 Press Release 2018-268, "Two Celebrities Charged With Unlawfully Touting Coin Offerings," (Nov. 29, 2018), available at *https://www.sec.gov/news/press-release/2018-268*.

31 Securities and Exchange Commission, Division of Enforcement Annual Report (2019), p.12, available at *www.sec.gov/files/enforcement-annual-report-2019.pdf.*

32 Press Release 2018-264, "Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities," (Nov. 16, 2018), available at *https://www.sec.gov/news/press-release/2018-264*; *Matter of CarrierEQ, Inc. d/b/a Airfox*, No. 3-18898, Sec. Act. Rel. 10575 (Nov. 16, 2018); *Matter of Paragon Coin, Inc.*, No. 3-18897, Sec. Act. Rel. 10574 (Nov. 16, 2018).

33 Press Release 2019-15, "Company Settles Unregistered ICO Charges After Self-Reporting to SEC, Feb. 20, 2019," available at *https://www.sec.gov/news/press-release/2019-15*.

34 *Matter of Gladius Network LLC,* No. 3-19004, Sec. Act Rel. No. 10608 (Feb. 20, 2019).

35 Press Release 2019-15, "Company Settles Unregistered ICO Charges After Self-Reporting to SEC," (Feb. 20, 2019), available at *https://www.sec.gov/news/press-release/2019-15*.

36 SEC v. Kik Interactive Inc., Civ. A. No. 19-cv-5244 (S.D.N.Y. June 4, 2019).

[37] Answer of Kik Interactive Inc. ¶ 4, Civ. A. No. 19-cv-5244 (S.D.N.Y. Aug. 6, 2019).

[38] SEC v. ICOBox, No. 2:19-cv-08066 (C.D. Cal. Sept. 18, 2019).

[39] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding Certain Cyber-Related Frauds Perpetrated Against Public Companies and Related Internal Accounting Controls Requirements*, Exch. Act. Rel. No. 84429, Oct. 16, 2018, available at *https://www.sec.gov/litigation/investreport/34-84429.pdf.*

[40] *Matter of Voya Fin. Advisors, Inc.,* No. 3-18840, Exch. Act Rel. No. 84288 (Sept. 26, 2018).

[41] Risk Alert, Office of Compliance Inspections and Examinations, "Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S-P – Privacy Notices and Safeguard Policies," (April 16, 2019), available at *www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Regulation%20S-P.pdf.*

[42] Press Release 2019-1, "SEC Brings Charges in EDGAR Hacking Case," (Jan. 15, 2019), available at *https://www.sec.gov/news/press-release/2019-1.*

[43] SEC v. Ieremenko, *et al*., No. 19-cv-505 (D.N.J. Jan. 15, 2019).

[44] Litigation Release No. 24193, "Two Defendants in Sec's Newswire Hacking Matter Found Guilty by Federal Jury in a Related Criminal Case," (July 10, 2018), available at *https://www.sec.gov/litigation/litreleases/2018/lr24193htm*.

[45] Peikin, *supra* n.4.

[46] Press Release 2019-171, "SEC and CFTC Charge Options Clearing with Failing to Establish and Maintain Adequate Risk Management Policies," (Sept. 4, 2019), available at *www.sec.gov/news/press-release/2019-171*; Administrative Proceeding File No. 3-18563, "SEC Orders Virtu to Pay $1.5 Million Penalty for Violations of Regulation SCI," (Sept. 30. 2019), available at *www.sec.gov/enforce/34-87155-s.*

[47] 17 CFR 242.1001 *et seq*.; *see also* Spotlight on Regulation SCI, *www.sec.gov/spotlight/ regulation-sci.shtml*.

[48] Press Release 2019-140, "Facebook to Pay $100 Million for Misleading Investors About the Risks It Faced From Misuse of User Data," (July 24, 2019), available at *www.sec.gov/news/press-release/2019-140*; SEC v. Facebook, Inc., No. 3:19-cv-04241 (N.D. Cal. July 24, 2019).

[49] Press Release 2018-71, "Altaba, Formerly Known as Yahoo!, Charged With Failing to Disclose Massive Cybersecurity Breach; Agrees to Pay $35 Million," (Apr. 24, 2018), available at *www.sec.gov/news/press-release/2018-71*.

[50] U.S. Securities and Exchange Commission, *supra* n.31, p. 28.

[51] *See also id*., pp. 2-6, 24-25 (discussing noteworthy issuer disclosure and auditor enforcement actions).

[52] Press Release 2019-194, "Mylan to Pay $30 Million for Disclosure and Accounting Failure Relating to EpiPen," (Sept. 27, 2019), available at *https://www.sec.gov/news/press-release/2019-194*.

[53] SEC v. Mylan N.V., No. 1:19-CV-2904 (D.D.C. Sept. 27, 2019).

[54] Press Release 2019-6, "SEC Charges Four Public Companies With Longstanding ICFR Failures," (Jan. 29, 2019), available at *https://www.sec.gov/news/press-release/2019-6*; *Matter of Grupo Simec S.A.B. de C.V*., No. 3-18972, Exh. Act Rel. No. 84996 (Jan. 29, 2019); *Matter of Lifeway Foods, Inc*., No. 3-18970, Exch. Act. Rel. No. 84995 (Jan. 29, 2019); *Matter of Digital Turbine, Inc*., No. 3-18971, Exh. Act. Rel. No. 84998 (Jan. 29, 2019); *Matter of Cytodyn Inc*., No. 3-18969, Exh. Act Rel. No. 84994 (Jan. 29, 2019); *Matter of Northwest Biotherapeutics, Inc*., No. 3-19582, Sec. Act. Rel. No. 87281 (Oct. 10, 2019).

[55] Press Release 2019-183, "SEC Charges Nissan, Former CEO, and Former Director with Fraudulently Concealing from Investors More than $140 Million of Compensation and Retirement Benefits," (Sept. 23, 2019), available at *https://www.sec.gov/news/press-release/2019-183*; *Matter of Nissan Motor Co., Ltd*., No. 3-19492, Exch. Act. Rel. No. 87054 (Sept. 23, 2019); SEC v. Ghosn, *et al*., No. 1:19-cv-08798 (S.D.N.Y. Sept. 23, 2019).

[56] Administrative Proceeding File No. 3-19532, "SEC Charges PPG Industries with Fraudulent Financial

Reporting," (Sept. 26, 2019), available at *https://www.sec.gov/enforce/33-10701-s*; *Matter of PPG Industries, Inc*., No. 3-19532, Sec. Act Rel. No. 10701 (Sept. 26, 2019).

57 Press Release 2019-34, "SEC Charges Volkswagen, Former CEO With Defrauding Bond Investors During 'Clean Diesel' Emissions Fraud," (Mar. 14, 2019), available at *https://www.sec.gov/news/press-release/2019-34*; SEC v. Volkswagen Aktiengesellschaft*, et al*., No. 19-cv-01391 (N.D. Cal. Mar. 14, 2019).

58 Press Release 2019-196, "Automaker to Pay $40 Million for Misleading Investors," (Sept. 27, 2019), available at *www.sec.gov/news/press-release/2019-196*; *Matter of FCA US LLC,* et al., No. 3-19541, Sec. Act Rel. 10706 (Sept. 27, 2019).

59 Press Release 2019-195, "Herbalife to Pay $20 Million for Misleading Investors," (Sept. 27, 2019), available at *www.sec.gov/news/press-release/2019-195*; *Matter of Herbalife Nutrition Ltd*., No. 3-19536, Sec. Act. Rel. No. 10703 (Sept. 27, 2019).

60 Press Release 2019-9, "Deloitte Japan Charged With Violating Auditor Independence Rules," (Feb. 13, 2019), available at *www.sec.gov/news/press-release/2019-9*; *Matter of Deloitte Touche Tohmatsu LLC, et al*., No. 3-18997, Exch. Act. Rel. No. 85115 (Feb. 13, 2019).

61 Press Release 2019-184, "SEC Charges PwC LLP With Violating Auditor Independence Rules and Engaging in Improper Professional Conduct," (Sept. 23, 2019), available at *www.sec.gov/news/press-release/2019-184*; *Matter of PricewaterhouseCoopers LLP*, No. 3-19490, Exch. Act Rel. No. 87052 (Sept. 23, 2019).

62 Chairman Jay Clayton, "Opening Remarks at the Municipal Securities Conference," (Dec. 7, 2018), available at *https://corpgov.law.harvard.edu/2018/12/07/opening-remarks-at-the-municipal-securities-conference/*.

63 Litigation Release No. 24520, "SEC Charges Municipal Advisor with Breaching Fiduciary Duty," (June 27, 2019), available at *www.sec.gov/litigation/litreleases/2019/lr24520.htm*; SEC v. Comer Capital Group, LLC, *et al*., Civ. A. No. 19-cv-4324 (N.D. Ill. June 27, 2019).

64 Administrative Proceeding File No. 3-19467, "SEC Charges Morgan Stanley for Recommending Unsuitable Municipal Bond Transactions," (June 29, 2019), available at *www.sec.gov/enforce/34-86988-s*; *Matter of Morgan Stanley Smith Barney, LLC*, No. 3-18566, Exch. Act Rel. No. 83571 (June 29, 2019).

65 Administrative Proceeding File No. 3-19408, "SEC Charges Former Municipal Bond Trader in Fraudulent Retail Order Scheme," (Sept. 3, 2019), available at *www.sec.gov/enforce/34-86848-s*; *Matter of Thomas C. Muldoon*, No. 3-19408, Exch. Act Rel. No. 86848 (Sept. 3, 2019).

66 *See*, *e.g*., Karen E. Woody, "No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement," 38 *Cardozo L. Rev*. 1727 (2017), available at *http://cardozolawreview.com/wp-content/uploads/2018/08/WOODY.38.5.pdf*.

67 Chairman Jay Clayton, "Remarks to the Economic Club of New York," (Sept. 9, 2019), available at *www.sec.gov/news/speech/speech-clayton-2019-09-09*; Peikin, *supra* n.4.

68 U.S. Securities and Exchange Commission, *supra* n.31, p. 28.

69 *See also id*., p. 26 (discussing notable FCPA actions).

70 Press Release 2019-27, "Mobile Telesystems Settles FCPA Violations," (March 6, 2019), available at *www.sec.gov/news/press-release/2019-27*.

71 *Matter of Mobile TeleSystems PJSC*, No. 3-19022, Exch. Act Rel. 85261 (March 6, 2019).

72 Press Release 2019-192, "Walmart Charged With FCPA Violations," (June 20, 2019), available at *www.sec.gov/news/press-release/2019-102*.

73 *Matter of Walmart Inc*., No. 3-19207, Exch. Act Rel. No. 86159 (June 20, 2019).

74 Administrative Proceeding File No. 3-19373, "SEC Charges Deutsche Bank with FCPA Violations Related to Its Hiring Practices," (Aug. 22, 2019), available at *www.sec.gov/enforce/34-86740-s*; Administrative Proceeding File No. 3-19537, "SEC Charges Barclays with FCPA Violations Related to Its Hiring Practices," (Sept. 27, 2019), available at *www.sec.gov/enforce/34-87132-s*.