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Securities and Exchange Commission Year in Review: Enforcement Actions and Issues from 2019—Part 1

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

As we embark upon a new year, anticipating the changes and developments that 2020 is likely to bring for those of us focused on the financial industry, we once again pause to take stock of the highlights and trends of the Securities and Exchange Commission's (SEC or Commission) enforcement program in 2019. We do so with our usual caveat that past performance is no guarantee of future results, but in general, the cases filed by the SEC and the public pronouncements of its Commissioners and officials in the Division of Enforcement (the Division or Enforcement) over the past year together provide a revealing picture of where SEC Enforcement is headed in the coming year.

Whereas fiscal year 2018 was a year of comparative tranquility for the SEC, in fiscal 2019, the agency faced some stormy political and operational seas. The dramatic, and often bitter polarization of the nation as a whole touched the SEC directly and severely when the federal government shut down in December 2018 and January 2019, bringing the agency to a 35-day near-standstill. Moreover, although the SEC has not found itself directly in the crosshairs of the Trump Administration, unlike other federal agencies such as the State Department and the Environmental Protection Agency, the agency experienced some political division, notwithstanding that its Chairman generally has revealed himself to be a moderate. 2019 witnessed some sharp, publicly-aired ideological disagreements among the Commissioners, marking somewhat of a departure from the SEC's broadly collegial public face in past years. The year also brought considerable market volatility and a more uncertain economic outlook, circumstances that tend to ratchet up public and Congressional pressure on the SEC and sharpen political differences.

Under Chairman Jay Clayton, whose tenure is now over two and a half years old, the priorities of the Division of Enforcement, and the differences from those under Clayton's predecessor, have become clear. The "broken windows" approach under Mary Jo White—pursuit of a large number of actions involving relatively minor violations of the federal securities laws in order to deter more significant misconduct—and the emphasis on obtaining admissions of wrongdoing from settling parties have been jettisoned. Instead, the Division of Enforcement has pivoted to five "core principles" that have guided its priorities over the past two years: (1) focusing on the retail investor; (2) holding individuals accountable for misconduct; (3) keeping pace with technological change; (4) pursuing remedies that effectively further enforcement goals, and (5) constantly assessing the Division's allocation of resources.[1]

In this article, which is presented in two installments, we examine SEC 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 first installment addresses: (1) internal developments at the agency, including leadership and personnel changes, sources of disagreement among the Commissioners, and procedural changes; and (2) external challenges to the SEC's regulatory authority. The second installment, to be published in a future issue of *The Investment Lawyer*, 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.

A Year of Continuity, Change, and Division within the SEC

Overview of Enforcement Activity in 2019

The Division of Enforcement discourages evaluation of its performance based solely on the metric of filed actions during the fiscal year, but that statistic does serve as an indicator of how aggressively Enforcement is pursuing the goals set out in its core principles. By that measure, the Division has remained busy, sustaining the uptick in filed actions it reported in fiscal 2018.[2] In fiscal 2019, Enforcement filed 526 "standalone" actions (actions brought in federal court or as administrative proceedings, as distinguished from "follow-on" proceedings seeking bars based on the outcome of actions brought by the SEC, criminal authorities or other regulators), as compared with 490 such actions in fiscal 2018, an increase of 7 percent.[3] As Enforcement acknowledged, however, the increase is due in part to the self-reporting and expedited resolution process of the Share Class Disclosure Initiative (discussed below).[4] On the other hand, it attained these numbers despite the 35-day government shutdown in December 2018 and January 2019.

As in fiscal 2018, standalone cases involving investment advisory and investment company issues were by a wide margin the largest category of Enforcement cases, constituting 36 percent of the total, followed by securities offerings (21 percent), issuer reporting/audit and accounting (17 percent), broker-dealers (7 percent), insider trading (6 percent), market manipulation (6 percent), FCPA (3 percent) and public finance (3 percent).[5] As to monetary relief, the SEC obtained $1.101 billion in penalties and $3.248 billion in disgorgement, as compared to $1.439 billion and $2.506 billion, respectively, for fiscal year 2018. Overall, total monetary relief was $404 million, or 10 percent, higher than in 2018, though these funds were not evenly distributed among cases; the 5 percent of cases obtaining the largest amounts of financial relief accounted for roughly 70 percent of the total recovery.[6]

Retail Investors Remain Front and Center

Protecting the interests of retail investors, a lodestar for Chairman Jay Clayton since he was sworn in to the Commission in 2017, remained at the core of the Division's stated mission. Clayton reaffirmed that Main Street investors are "the market participants we [at the SEC] have at the forefront of our minds," and the Enforcement program in 2019 followed suit.[7] Although the focus on retail investors has brought a thematic shift from that of his predecessor Mary Jo White, in practice, it has not lead to an aversion to charging large financial institutions, as the SEC's actions against investment advisers and issuers during fiscal year 2019, which we examine below, demonstrate. To the contrary, Enforcement Co-Director Steven Peikin has been explicit in "reject[ing] the premise that we face a binary choice between protecting Main Street investors and policing Wall Street." Rather, in his view, "the two are complementary," in that retail investors "fall victim not only to smaller time Ponzi schemes and micro-cap fraudsters, but also to the misconduct of large financial institutions and intermediaries."[8]

The Retail Strategy Task Force (RSTF), which was formed in 2017 to develop data-driven analytic strategies for identifying practices harmful to retail investors and generate enforcement actions in those areas, remained active in 2019. During the year, the RSTF pursued initiatives involving offering fraud, market manipulation, and inadequate disclosures of fees, expenses, and conflicts of interest by asset managers.[9] The SEC also announced in 2019 its Teachers' Initiative and Military Service Members' Initiative, which are focused on educating these respective categories of investors about, among other things, investment fraud. The Division of Enforcement can be expected to prioritize cases involving harm to teachers and veterans accordingly.

Leadership Rotates and Staff Hiring Resumes

2019 also saw some significant changes with respect to personnel. In July, Allison Herren Lee was sworn into office as a Commissioner, replacing Kara Stein, who stepped down in January.[10] Lee, an attorney, previously spent over a decade at the SEC as a Senior Counsel in the Division of Enforcement's Complex Financial Instruments Unit and as counsel to Commissioner Stein, and served as a Special Assistant US Attorney. Prior to joining the government, she was an attorney in private practice with a focus on securities, antitrust and commercial litigation. Her appointment fills the empty Democratic seat following Stein's departure, restoring the Commission to its previous composition of three Republicans and two Democrats. (Under the Securities Exchange Act, no more than three commissioners may be from the same political party, a limitation intended to prevent the Commission from becoming unduly partisan.[11]) It is still early in her tenure, but her presence on the Commission and her background in Enforcement may sharpen already intense ideological differences over issues including the recently-adopted Regulation Best Interest, proposed limitations on whistleblower awards and the appropriateness of corporate penalties. Commissioner Robert Jackson, the other Democrat on the Commission, who has been serving since January 2018, was expected to step down on the expiration of his term in June 2019 and return to NYU School of Law, where he is currently on leave. In September, however, he announced his decision to remain on the Commission pending the search for his replacement.[12]

At the Staff level, Adam Aderton, a longtime member of the Division of Enforcement's Asset Management Unit (AMU), was named Co-Chief of the Unit following Anthony Kelly's departure in November 2018. He will serve alongside AMU Co-Chief Dabney O'Riordan.[13]

Robert Cohen, who had been the Chief of Enforcement's Cyber Unit, left the SEC in August 2019 for private practice. In December, the Commission named as his replacement, Kristina Littman, who joined the SEC as an Enforcement attorney in 2010 and most recently served as Senior Advisor to Chairman Clayton.[14]

The lifting of the agency-wide hiring freeze, in place since late 2016, on April 1, 2019 allowed the SEC to begin the much-needed task of replenishing its Staff, whose numbers had shrunk considerably due to the freeze and attrition. The agency's budget for fiscal year 2019 allowed it to add approximately 100 new positions, putting the agency back at 2014 staffing levels.[15] Twenty-two new positions were allocated to the Division for fiscal 2019, and 15 new Staff joined Enforcement during the fiscal year. Despite the new hiring, the number of Staff and contractors in Enforcement was still nearly 9 percent below the level of fiscal 2016.[16]

Political Divisions in Sharp Relief

Though ideological differences among commissioners are a perennial characteristic of the SEC, divisions were especially conspicuous in 2019 and led to some sharply and publicly expressed disagreements. With respect to regulation of digital assets and initial coin offerings, Commissioner Hester Peirce continued to criticize the SEC's approach as unduly rigid and impeding innovation.[17] In addition, a proposal currently before the Commission to reduce the size of certain whistleblower rewards and tighten the requirements for reporting tips was a particular flashpoint, an issue that we discuss in more detail below.

Another source of particularly vocal discord was the SEC's controversial adoption of Regulation Best Interest (BI) in June. The Commission adopted Regulation BI as part of a package of rulemakings and interpretations designed "to enhance the quality and transparency of retail investors' relationships with investment advisers and broker-dealers[.]"[18] Regulation BI, which became effective on September 10, 2019, raises the standard of conduct for broker-dealers beyond the previously applicable duty of suitability by requiring that broker-dealers "act in the best interest of the retail customer at the time [a] recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer," and address, disclose, and in some instances eliminate conflicts of interest.[19]

The SEC's proposal of the rule generated significant controversy, with many consumer advocates arguing that the "best interest" standard is inadequate to protect investors.[20] The Commission's 3-1 vote to adopt Regulation BI fell along party lines, with Commissioner Robert Jackson Jr., at the time the SEC's sole Democratic commissioner, voting against and publicly criticizing the rule after its adoption.[21] Chairman Clayton and Commissioner Jackson expressed pointedly opposing views on the rule in testimony on the same day in September 2019 before the House Financial Services Committee, with Commissioner Jackson asserting that the June package that included Regulation BI sets forth a "muddled standard," while Chairman Clayton defended the rule as establishing a "clear disclosure obligation."[22] Regulation BI faces significant hostility outside the SEC as well, and the rule continues to encounter significant headwinds from its opponents.[23]

Commission's Authority Faces Constitutional Challenges, Legislative Proposals

Supreme Court Affirms Broad Reach of Rule 10b-5 Primary Liability

In March of 2019, the Supreme Court decided *Lorenzo v. SEC*,[24] which affirmed the SEC's ability to pursue those who disseminate a false or misleading statement under Rule 10b-5, whether or not they made the statement in the first instance. In 2011, the Supreme Court decided in *Janus Capital Group, Inc. v. First Derivative Traders*[25] that the SEC lacked such authority under Rule 10b-5(b), and that only the "maker" of an untrue statement of material fact, that is, the "person or entity with ultimate authority over the statement, including its content and whether and how to communicate it,"[26] can be liable under that subsection of the Rule. The Court in *Lorenzo* recognized that the more broadly worded subsections (a) and (c) of Rule 10b-5 can reach those who pass along a misrepresentation, even if they did not craft the words.[27]

Francis Lorenzo served as the director of investment banking for Charles Vista, LLC, a registered broker-dealer located in Staten Island, New York.[28] In October of 2009, Lorenzo learned that one of his clients, Waste2Energy, despite publicly disclosing that it maintained total assets of approximately $14 million as of March 31, 2009, was really worth less than $400,000.[29] Lorenzo, at the direction of his boss, sent two emails to prospective investors of Waste2Energy, in which his boss described a debenture offering and represented that the investment in Waste2Energy had "3 layers of protection," and had $10 million of "confirmed assets."[30] The Commission charged Lorenzo with violating Rule 10b-5 and found him liable under subsections (a) and (c).[31] He appealed, arguing that *Janus* precluded liability since he was not the "maker" of the misrepresentations.[32]

A 6-2 majority of the Court (Justice Kavanaugh having recused himself), in an opinion by Justice Breyer, disagreed, taking a literal approach to determining whether liability could properly flow from Rule 10b-5. The majority reasoned that by disseminating what Lorenzo knew to be false statements to two prospective investors, he "employ[ed]" a "device, scheme, or artifice to defraud" within the meaning of subsection (a) and by the same conduct, he "engage[d] in a[n] act, practice or course of business that "operate[d] . . . as a fraud or deceit" under subsection (c).[33]

In view of the Court's determination that Lorenzo's conduct falls within the ambit of subsections (a) and (c), some have suggested that the *Lorenzo* decision could bring innocent actors into the Commission's crosshairs. As Justice Thomas wrote in dissent, "[t]he fact that Lorenzo 'sent false statements directly to investors' in e-mails that 'invited [investors] to follow up with questions,' [] puts him in precisely the same position as a secretary . . . ."[34] The majority acknowledged the potential for "actors tangentially involved" to be caught up in Rule 10b-5 liability, but added that the decision should not be read so broadly because Lorenzo had "invited [the investors] to follow up with questions, and did so in his capacity as vice president of an investment banking company"—a "paradigmatic example" of a culpable individual under Rule 10b-5. Nevertheless, the decision leaves unclear the precise scope of liability under Rule 10b-5, and it remains to be seen how the lower federal courts will apply *Lorenzo*. Thus far, there has been only one appellate court decision, which dealt with an upper-echelon broker-dealer and investment advisor, like Lorenzo a "paradigmatic example."[35]

Furthermore, Justice Thomas questioned the viability of *Janus* after *Lorenzo*, writing in dissent that the majority's decision renders *Janus* "a dead letter."[36] Justice Breyer pushed back, claiming that "we can assume that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information . . . ."[37] It will therefore likely fall to the lower courts to clarify the continuing applicability of *Janus*.

DC Circuit Makes It Harder for SEC to Prove Willful Misconduct

Earlier this year, the DC Circuit decided *Robare Group, Ltd. v. SEC*,[38] which may shape the Commission's enforcement actions for years to come by limiting its ability to charge investment advisers for false SEC filings, and may narrow the SEC's ability to bring other charges requiring a showing that a wrongdoer acted "willfully." In *Robare*, the Commission instituted enforcement proceedings against The Robare Group and its principals, Mark Robare and Jack Jones (collectively, TRG), for their decade-long failure to disclose sufficiently a conflict of interest arising from a revenue-sharing agreement in their Form ADV filings with the Commission.[39] (We discuss the alleged conflict of interest in further detail below.) The SEC charged TRG under Section 206 of the Investment Advisers Act (Advisers Act), the Advisers Act's anti-fraud provision, as well as Section 207 of the Act, which makes unlawful the practice of willfully making or omitting any untrue statement of a material fact "in any . . . report filed with the SEC."[40]

The Commission, upon *de novo* review of an Administrative Law Judge's (ALJ) decision to dismiss all charges, found that TRG violated Section 206(2) and Section 207. On TRG's appeal, the DC Circuit affirmed the Commission's findings as to Section 206(2), but reversed the Commission's ruling that the same merely negligent conduct gave rise to a Section 207 violation.[41] The Court left the specific definition of "willfulness" for another day, because both TRG and the Commission agreed that this case should be governed by *Wonsover v. SEC*.[42] In *Wonsover*, the DC Circuit held that in order to act willfully, investment advisors must "intentionally commit[] the act which constitutes the violation."[43] The DC Circuit in *Robare* rejected the Commission's position that negligent conduct could be "willful," explaining that the Advisers Act does not proscribe the willful completion or filing of the Form ADV.[44] Rather, it makes unlawful the *willful omission or inclusion or material facts*, thus converting a Section 207 claim into a *scienter*-based violation.[45] Absent a finding that TRG "subjectively intended to omit material information" from their Form ADVs, TRG could not be held liable because its conduct was not willful.[46]

With the *Robare* decision on the books, the SEC faces the prospect that courts may interpret other provisions of the securities laws with a willfulness standard, such as Section 203 of the Advisers Act and Section 9(b) of the Investment Company Act, similarly. Certainly, *Robare*'s willfulness holding will weaken the Commission's authority to bring Section 207 claims moving forward.

Kokesh Results in Reduced Monetary Remedies, More Challenges

The Commission continues to experience the fallout from the Supreme Court's 2017 decision in *Kokesh v. SEC*.[47] The Supreme Court held in that case that because disgorgement often serves a punitive, as opposed to a remedial, function, the Commission's ability to seek disgorgement is subject to the five-year statute of limitations.[48] The decision was, and continues to be, a significant blow to the SEC's ability to obtain monetary relief. The Commission's Division of Enforcement noted in its Annual Report for fiscal year 2019 that the *Kokesh* decision has resulted in the loss of approximately $1.1 billion in disgorgement for filed cases.[49] However, the Commission's estimate may dramatically undervalue the true impact of its ability to seek disgorgement, as the Commission has strategically prioritized its resources to pursue actions within the five-year statute of limitations.[50] Chairman Clayton has actively criticized the *Kokesh* decision, commenting that it rewards well-concealed frauds, and has called on Congress to pass legislation providing the Commission with the authority to continue to pursue disgorgement beyond the statutory limitations period.[51] More recently, however the Commission has been confronted with a significant challenge to its ability to obtain disgorgement altogether.

On November 1, 2019, the Supreme Court granted *certiorari* to determine an issue that was left undecided in *Kokesh*: whether the Commission has the authority to obtain disgorgement remedies *at all* for securities laws violations in federal court.[52] In *SEC v. Liu*,[53] the Commission brought enforcement proceedings in federal district court against Charles Liu and Xin Wang for their misappropriation of monies received from Chinese investors.[54] Participants in the US Immigrant Investor Program, otherwise known as the EB-5 program, invested at least $1 million each with Liu and Wang, believing that their funds were being spent on a proton therapy cancer treatment center.[55] The District Court entered summary judgment in favor of the Commission, and imposed disgorgement of $26.7 million, on top of an additional $8 million civil penalty.[56] The Ninth Circuit affirmed.

In enforcement actions brought before federal district courts, Congress has expressly authorized the SEC to obtain only injunctive relief, equitable relief, and/or civil monetary penalties.[57] As the Supreme Court explained in *Kokesh*, the Commission nevertheless has had a longstanding practice of obtaining monetary relief through disgorgement as well by using the "inherent equity power to grant relief ancillary to an injunction," the only statutory mechanism that the Commission could use to pursue violation of the securities laws before 1990.[58] Now, in light of *Kokesh*'s finding that disgorgement is punitive in most instances, Liu and Wang argue that the Commission no longer has the authority to seek disgorgement in federal actions, because equitable relief is meant to have a remedial purpose, rather than a punitive one.[59]

Liu and Wang's petition alleges that the Commission has been impermissibly collecting billions of dollars in disgorgement.[60] In fiscal year 2019 alone, the Commission collected $3.248 billion in disgorgement, highlighted by its enforcement action against Woodbridge Group of Companies LLC and its former owner, in which it collected disgorgement and associated penalties of approximately $1 billion.[61] It remains to be seen how the Division of Enforcement will proceed in light of a challenge to disgorgement. Several pre-*Kokesh* disgorgement assessments already have been challenged,[62] so Enforcement may switch gears to pursuing actions in administrative proceedings, where the Commission possesses explicit statutory authority to seek disgorgement.

Congress Responds

Chairman Clayton's demands for greater Commission authority may prove fruitful in 2020. Both the Senate and the House of Representatives have introduced legislation that will provide the Commission with greater authority to pursue securities laws violators through an increased statute of limitations, higher civil penalty fines, and a broader array of mechanisms to remedy fraud.

On March 4, 2019, Virginia Senator Mark R. Warren and Louisiana Senator John Kennedy, members of the Senate Banking Committee, introduced the Securities Fraud and Investor Compensation Act.[63] The proposed bill would amend the Securities and Exchange Act to grant the Commission the authority to file restitution claims to remedy investor losses within a 10-year period. Historically, the Commission has used injunctive relief, civil monetary penalties, and disgorgement. But where the fraudster either earned little profit or earned its profit outside the five-year statute of limitations, the Commission has had difficulties obtaining enough monetary relief to make investors whole. Restitution would provide the Commission with a mechanism to pursue violators to the extent of the actual losses of their victims, as opposed to earned profits. The bill was introduced in response to the Supreme Court's decision in *Kokesh*, but does nothing to overturn that decision, as the Commission's authority to pursue disgorgement claims would remain cabined by the five-year statute of limitations. S. 799 has been referred to the Committee on Banking, Housing, and Urban Affairs.[64]

The House Financial Services Committee also has approved three separate bills that would increase the Commission's authority. H.R. 3641, introduced by California Representative Katie Porter, would increase the amount of civil monetary penalties the Commission can seek.[65] It also would triple the penalty cap for recidivists and permit the Commission to assess these penalties in both federal court and administrative proceedings. The Strengthening Fraud Protection Act, introduced by Utah Representative Ben McAdams and Michigan Representative Bill Huizenga, would directly overturn *Kokesh* by providing the Commission with a 14-year statute of limitations to pursue disgorgement claims.[66] The House passed the latter bill in a 314-95 vote on November 18, 2019.[67] The other bills remain subject to a vote by the full House.[68]

The Commission's inability to collect an estimated $1.1 billion in disgorgement relief has led to both branches of Congress seeking to strengthen the Commission's authority to obtain monetary relief. It remains to be seen which bills will become law, but the sheer number of proposals floating around Congress may reflect the public sentiment to increase the Commission's power. Further, this pending legislation could moot the *Liu* dispute.

Lower Court Challenges to *Lucia's* Unanswered Questions

In *Lucia v. SEC,*[69] the Supreme Court held that the Commission's appointed ALJs were "Officers of the United States" under the Constitution, and therefore must comply with the Appointments Clause's requirement that Officers be appointed by an agency head.[70] The Commission complied in August 2018 when it re-appointed all of its existing ALJs. However, the Supreme Court failed to reach two critical constitutional questions that continue to loom and could adversely affect the Commission's administrative proceedings in 2020. Specifically, the Supreme Court refused to decide whether the Commission's ALJs are "principal" or "inferior" officers. If the former, only the President of the United States, with the advice and consent of the Senate, would be able to appoint them. In addition, the Court has yet to address the question of whether the Commission's current procedures for removing ALJs only for "good cause" found by the Merit Systems Protection Board unconstitutionally insulates them from presidential removal since there exists a two-tier system for doing so.[71]

After the Commission re-appointed its ALJs, Lucia's case was remanded back to an ALJ. Raymond Lucia, along with another respondent in an SEC administrative proceeding, Rachel Cochran, have filed suit in federal court, alleging that the Commission's appointment and removal practices violate the Constitution.[72] Prior to the *Lucia* decision, Cochran was fined $22,500 and banned from practicing as an accountant for five years, a decision which the Commission vacated post-*Lucia*.[73] Both Lucia and Cochran have moved for relief *before* their second bout with the Commission's administrative proceedings.

The Commission has adopted the contrary view that individuals such as Lucia and Cochran must fully exhaust their administrative remedies before proceeding with review in an Article III court. Five circuits have endorsed the Commission's position, finding that the *Thunder Basin* Doctrine, announced in *Thunder Basin Coal Co. v. Reich,*[74] prohibits an administrative litigant from access to Article III courts where Congress has created a "statutory scheme" with a "fairly discernible" intent to "preclude judicial review."[75] Both the Southern District of California and the Northern District of Texas adopted the Commission's position and dismissed Lucia and Cochran's challenges, respectively.[76] Cochran appealed the district court's dismissal to the Fifth Circuit and moved the Court for preliminary relief to enjoin the resumption of the Commission's administrative proceedings against Cochran. The Fifth Circuit granted the motion,[77] presumably adopting the position that Cochran possesses a likelihood of success on the merits of her argument that a constitutional challenge is "wholly collateral" to the subject matter of the Commission's proceedings, an Appointment Clause issue is outside the realm of the Commission's expertise, and proceeding with unconstitutional administrative proceedings robs her of any "meaningful" judicial review—an exception to the applicability of the *Thunder Basin* Doctrine.[78]

The *Thunder Basin* issue does not answer the appointments and removal issues identified in *Lucia*. It may just kick the can down the road, while the Commission continues to pursue administrative enforcement actions. Critics have long maintained that the Enforcement Division maintains a significant "home field advantage" in front of the Commission's ALJs. Indeed, the very ALJ who found Cochran had violated federal accounting regulations pre-*Lucia* commented that "he had never ruled against the agency's enforcement division."[79] On August 28, 2018, the Commission reassigned approximately 200 administrative proceedings to ALJs appointed by the head of the Commission.[80] However, the constitutional validity of these administrative proceedings, as well as any commenced in fiscal year 2019, remain in question.

Cato Challenges Commission's Use of "Neither Admit nor Deny"

On January 9, 2019, the Cato Institute, a think tank based in Washington DC, filed suit against the Commission in the District Court of DC, alleging that the Commission's rule prohibiting individuals who have settled charges with the Commission from denying the government's allegations is an unconstitutional restriction violating the First Amendment.[81] The Commission's "Gag Regulation," codified at 17 C.F.R. § 202.5(e), permits the Commission to include a "neither admit nor deny" provision in settlement agreements, which prohibit an accused from either admitting or denying the Commission's accusations post-settlement. Today, critics argue that these provisions have created a shield protecting overzealous prosecution and governmental misconduct. As noted in its Complaint, Cato maintains that these "gag orders" obscure the public's visibility into the Commission's enforcement actions, and removes government officials from accountability for potential misconduct. The Commission has moved to dismiss Cato's claims, arguing that Cato lacks standing under Article III, Cato's complaint fails to state a violation of the First Amendment because two private parties consented to a restriction of their First Amendment rights, and the court does not possess jurisdiction to overturn all settlement agreements. The Court has yet to rule on the motion, but its decision potentially could allow settling defendants more scope to challenge the merits of the charges against them.

Commission Streamlines the Waiver Process for Settling Parties

On July 3, 2019, Chairman Clayton announced that the Commission would be considering requests for waivers of collateral consequences simultaneously with settlement offers.[82] This marks a shift from the SEC's prior practice, in which settlement and waiver requests were considered separately.

Enforcement actions, such as cease-and-desist orders, can trigger certain disqualifications under the federal securities laws, resulting in loss of safe harbor provisions, the inability to conduct certain offerings, or removal of "well-known seasoned issuer" status.[83] The Commission has the authority to grant a waiver to settling entities of these collateral consequences. Where a defendant demonstrates "good cause" to be exempt from these collateral consequences, the Divisions of Corporate Finance and Investment Management issue a waiver recommendation, which is normally adopted by the Commission. Prior to Chairman Clayton's announcement, the Division of Enforcement would negotiate a settlement agreement with the defendant before that entity was eligible for a waiver.[84] The former process for obtaining waivers added unnecessary complexity and sometimes resulted in the decision to disqualify entities from certain benefits based on factors unrelated to the conduct that resulted in settlement.

Moving forward, Chairman Clayton has elected to resolve some of the ambiguity of the process by informing entities that they can make a waiver request simultaneous with their offer of settlement.[85] The Commission, in turn will make independent decisions on the settlement offer and the waiver request, but upon the same conduct that gave rise to the enforcement proceeding. If a settlement offer is accepted and a waiver request is granted in part or denied, the defendant has the opportunity to notify the Commission within five business days if it elects to proceed with the settlement.[86] The Commission will then proceed with the enforcement action if the defendant fails to make the required notification or if the defendant withdraws the settlement offer.[87] This new process benefits settling entities by permitting them to evaluate the entire landscape before deciding whether to proceed with settlement or litigate.

There has been a move in Congress to make it more difficult to obtain waivers. In June of 2019, California Representative Maxine Waters, Chair of the House Financial Services Committee, introduced the Bad Actor Disqualification Act of 2019.[88] The Act, among other things, would require all submitted waiver applications to be subject to public comment, a hearing, and a vote by the Commission. It also would heighten the standard applied by the Commission in granting a permanent waiver, thus running counter to Chairman Clayton's goal of expediting the settlement process.

Whistleblower Program Remains Robust

Trends and Statistics

Since its creation in 2011, the Commission's Whistleblower Program has generated approximately $2 billion in financial remedies, according to the Division of Enforcement's fiscal year 2019 annual report.[89] As compared to other federal whistleblower programs, the Commission's version has been seen as a smashing success.[90] As of the end of fiscal 2019, the Commission has now awarded approximately $387 million to 66 whistleblowers through the Program (which still constitutes a mere drop in the bucket in comparison to estimated remedies it obtained).[91]

The Commission continued to issue substantial whistleblower awards in fiscal 2019. On March 26, 2019, it announced a total $50 million award to two joint whistleblowers, $37 million of which went to one of the whistleblowers, which ranks as the third-highest award since its $50 million award to a whistleblower in March of 2018.[92] Other significant awards issued by the Commission include $4.5 million to a whistleblower on May 24, 2019, and $3 million to joint whistleblowers on June 3, 2019.[93]

The opportunity for significant monetary awards continues to fuel the Commission's Whistleblower Program. In fiscal 2019, the Commission received a record number of whistleblower claims.[94] Also supporting the success of the Program is the Commission's zealous efforts to protect whistleblowers, as evidenced by its November 4, 2019 press release, when the Commission announced that it was amending its complaint against online portal Collectors Café for its alleged violations of the Commission's whistleblower protection rules.[95]

Commission and Congress Propose Changes to Whistleblower Program

The Commission announced on June 28, 2018 that it was considering several amendments to the Whistleblower Program, including a controversial cap on whistleblower awards.[96]

Currently, the Commission awards whistleblowers who provide critical information leading to a successful enforcement action between 10 percent and 30 percent of the ultimate monetary penalties imposed. The proposed amendment would provide the Commission with the authority to reduce a whistleblower's award which, under the percentage award scheme, would be greater than $30 million.[97] In other words, when the Commission imposes monetary sanctions greater than $100 million, the proposed changes would permit the Commission to limit those awards to the lower end of 10 percent of the ultimate monetary sanctions or $30 million.[98]

This cap proposal has drawn significant criticism. When the amendment was put to a vote in June 2018, Commissioner Stein fiercely opposed it, arguing that such a cap would weaken the burgeoning Program unnecessarily.[99] The Commission has received 3,940 letters directly from the National Whistleblower Center's Action Alert Network opposing the amendment.[100] The amendment's critics argue that the cap proposal would deter executives from voicing their concerns about the largest securities violations in the country, because they would otherwise stay silent absent a large monetary award. The Commission counters that awards over $30 million represent a windfall, as that large of an award will adequately compensate company executives for the risk involved when turning over evidence to the Commission. Chairman Clayton supports the amendment, claiming that the cap would allow the Commission to award greater amounts to whistleblowers who are ultimately awarded much smaller amounts, which make up the majority of whistleblowers.[101]

The comment period for the cap proposal continued into the fourth quarter of 2019. The Commission recently cancelled a scheduled meeting on October 23, 2019 to discuss the proposed amendments to the Whistleblower Program,[102] which potentially reflects the negative feedback it has received since its June 2018 announcement. For now, the Whistleblower Program proceeds without a cap.

Insider Trading Still a Focus

Trends and Statistics

Although the Division of Enforcement brought fewer insider trading cases in fiscal year 2019 than in fiscal 2018—30 standalone cases as compared to 51 in the previous year—those actions still constituted 6 percent of the total, and the SEC continues to devote substantial resources to detecting and prosecuting insider trading.[103] In particular, the Commission's Market Abuse Unit (MAU) continues to turn to technological advancements to flag potentially suspicious trades.[104] Specifically, the MAU has turned to a program known as ARTEMIS, which analyzes "suspicious trading patterns" and "relationships among multiple traders" to identify questionable trades at an increasing rate.[105]

The recent downturn in enforcement actions may present an anomaly, or it may reflect the Commission's increased pursuit of investment advisers and investment companies for material misrepresentations and omissions or deficient filings, as manifested by the Division bringing almost twice as many such actions in fiscal year 2019 than it did in fiscal year 2018.[106] Regardless of the decrease in insider trading enforcement actions, the Commission netted a few high profile inside traders in fiscal year 2019:

- The Commission obtained a jury verdict against a New York securities broker, who had learned about three potential acquisitions and tipped his former colleague.[107]
- The Commission reached a settlement agreement with a New York banking consultant who purchased securities after eavesdropping on his former fiancée's phone conversations discussing a potential airline merger.[108]
- The Commission procured an emergency order freezing $2.5 million in profits that were suspiciously gained prior to Chevron Corporation's April 12, 2019 announcement that it intended to acquire Anadarko Petroleum Corporation.[109]
- The Commission charged an in-house lawyer at SeaWorld Entertainment Inc., after he purchased 18,000 shares of the company's stock the day after he received confidential earnings information.[110]

Developments in Tippee Liability

There has in recent years been much shifting of the legal landscape surrounding the question of when a tippee—the recipient of material non-public information from a tipper—may be liable for insider trading. The Supreme Court held in its 1983 decision *Dirks v. SEC* that the liability of a tippee directly derives from that of the tipper.[111] It determined that a tipper is liable for insider trading where he or she breached a fiduciary duty to the company's shareholders by both disclosing the confidential information and obtaining some personal benefit.[112] The *Dirks* Court specified that a tipper derives a personal benefit where, among other circumstances, the tipper receives a gift of confidential information to a trading relative or friend, or "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient."[113]

In 2014, the Second Circuit decided *United States v. Newman*, which defined "personal benefit" in a way that appeared to limit significantly the SEC's ability to pursue insider trading cases. The Court held that the government must demonstrate something beyond a "meaningfully close personal relationship," namely, a relationship "generat[ing] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similar valuable nature."[114] Though *Newman* was seen as a severe blow to the SEC at the time, the Supreme Court in *Salman v. United States*, decided in 2016, rejected the Second Circuit's conclusion, finding that "gifts" of confidential information from tippers to relatives or friends permit the inference that the tipper received some personal benefit.[115] Thus, *Salman* reaffirmed the holding in *Dirks* that the existence of a "meaningfully close personal relationship" is sufficient to establish liability for a tippee.

The Second Circuit again had occasion to consider the personal benefit requirement in *United States v. Martoma*, decided in 2017.[116] Matthew Martoma, a portfolio manager at an affiliate of S.A.C. Capital Advisors, had accumulated shares in two pharmaceutical companies that were jointly developing an experimental drug to treat Alzheimer's disease. In order to obtain information about the drug, Martoma reached out to expert networking firms and arranged paid consultations with two doctors who were working on the drug's clinical trial. Although their roles required them to keep the results of the trial confidential, the doctors shared non-public information about the trial with Martoma, and one of them discussed negative trial results with Martoma at length before they were announced publicly.[117] Martoma then reduced his fund's investment in the two pharmaceutical companies that were developing the drug, and bought options on and sold short the companies' shares, resulting in gains of over $80 million and averted losses of nearly $200 million for S.A.C.[118] The Department of Justice and the SEC brought criminal and civil insider trading charges, respectively, against Martoma based on those trades. Martoma was convicted and appealed to the Second Circuit, arguing that the trial court had incorrectly instructed the jury as to *Newman*'s "meaningfully close personal relationship" requirement.

The Second Circuit affirmed. After parsing the language of *Dirks*, the Court held that the government may demonstrate the existence of a tipper's personal benefit through evidence of a relationship between tipper and tippee suggesting that the tipper intended to benefit himself or "evidence that the tipper's intention was to benefit the tippee." Here, the Court found, there was sufficient evidence as to both: (1) the doctor who tipped Martoma about the negative results aimed to continue his lucrative consulting relationship with S.A.C. (a *quid pro quo*); and (2) the doctor knew that Martoma was an investment manager who needed information about the trial to make profitable trading decisions (intent to benefit the tippee). The Second Circuit therefore declined to reach the question of the "meaningfully close personal relationship" standard under *Newman*.[119]

In January 2019, the Second Circuit in *Gupta v. United States* underscored that a personal benefit does not have to involve a financial gain.[120] The Court in that case affirmed the conviction of Rajat Gupta, a former Goldman Sachs board member who tipped Raj Rajaratnam, the founder of the Galleon Group family of hedge funds, with material non-public information about various companies on whose boards Gupta sat. Here, the Second Circuit found, Gupta's desire to maintain "a good relationship with a frequent business partner" (that is, Rajaratnam) was sufficient to satisfy the personal benefit test.[121]

The courts likely will continue to grapple with the implications of *Newman* and the contours of the personal benefit test for some time to come. Whatever the outcome, another critical part of the *Newman* holding remains intact: "[A] tippee's knowledge of the insider's breach necessarily requires knowledge that the insider disclosed confidential information in exchange for personal benefit."[122] An example should suffice to illustrate the difficulty this poses for the SEC. This summer, a district judge in the Southern District of New York vacated a plea deal reached in 2013 because the government failed to set forth any evidence demonstrating that Richard Lee, the defendant, knew of any personal benefit received by the tippers.[123] Indeed, Lee, who worked as a portfolio manager for S.A.C., received the information from an analyst, who did not disclose where he learned the information.[124]

The Insider Trading Prohibition Act

The proposed Insider Trading Prohibition Act, introduced by Connecticut Representative James Himes in May 2019, and passed by the full House on December 5, 2019, would largely eliminate the open issues left by *Martoma*.[125] If passed by the Senate and signed by President Trump, the Act would provide more clarity on the requirements needed to demonstrate an insider trading violation. It seeks to eliminate the requirement that the tippee be aware of the personal benefit to the tipper and expand the prohibition to include deceptive or wrongful taking of material, non-public information, even absent a breach of fiduciary duty.[126]

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

NOTES

1 Securities and Exchange Commission, Division of Enforcement Annual Report (2019), p.10, available at *www.sec.gov/files/enforcement-annual-report-2019.pdf*.

2 *See* Securities and Exchange Commission, Division of Enforcement Annual Report (2018), p. 9, available at *https://www.sec.gov/files/enforcement-annual-report-2018.pdf*.

3 Securities and Exchange Commission, *supra* n.1, p.14.

4 *Id.*

5 *Id*. at 15.

6 *Id.* at 16-17.

7 Chairman Jay Clayton, "Management's Discussion and Analysis of the SEC: Remarks at the 'SEC Speaks' Conference," Apr. 8, 2019, available at *www.sec.gov/news/speech/speech-clayton-040819*.

8 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*.

9 *See id*.

10 Press Release 2019-121, "Allison Herren Lee Sworn In As SEC Commissioner," (July 9, 2019), available at *www.sec.gov/news/press-release/2019-121*.

11 *See* 15 U.S.C. § 78d(a).

12 Andrew Romanas, "SEC's Jackson Says He'll Stay for Now as Successor Talk Heats Up," *Bloomberg Law*, (Aug. 26, 2019), available at *https://news.bloomberglaw.com/securities-law/secs-jackson-says-hell-stay-for-now-as-successor-talk-heats-up*. Commissioners are permitted to stay on for approximately 18 months after the expiration of their terms if they have not been replaced before then. *See Current SEC Commissioners*, *www.sec.gov/Article/about-commissioners.html.*

13 Press Release 2019-64, "Adam S. Aderton Named Co-Chief of the Asset Management Unit," (May 2, 2019), available at: *www.sec.gov/news/press-release/2019-64*.

14 Press Release 2019-142, "Robert A. Cohen, Cyber Unit Chief, to Leave SEC After 15 Years of Service," (July 29, 2019), available at *https://www.sec.gov/news/press-release/2019-142; Press Release 2019-247*, "Kristina Littman Named Chief of the Cyber Unit," (Dec. 2, 2019), available at *https://www.sec.gov/news/press-release/2019-247*.

15 *See* Clayton, *supra* n.7; Ramonas, *supra* n.12.

16 *U.S. Securities and Exchange Commission*, *supra* n.1, p. 22.

17 *See*, *e.g.*, Commissioner Hester M. Peirce, "Lies and Statistics: Remarks at the 26th Annual Securities Litigation and Regulatory Enforcement Seminar," Oct. 26, 2018, available at *https://www.sec.gov/news/speech/peirce-speech-lies-statistics-102618*; Commissioner Hester M. Peirce, *How We Howey*, May 9, 2019, available at *https://www.sec.gov/news/speech/peirce-how-we-howey-050919*.

18 Press Release 2019-89, "SEC Adopts Rules and Interpretations to Enhance Protections and Preserve Choice for Retail Investors In Their Relationships With Financial Professionals," (June 5, 2019), available at *www.sec.gov/news/press-release/2019-89*. The package followed the demise of the fiduciary standard adopted by the Department of Labor (DOL) during the Obama Administration, under which broker-dealers would have been deemed fiduciaries with respect to ERISA plans and individual retirement accounts. The US Court of Appeals for the Fifth Circuit vacated that rule in 2016 as beyond the DOL's authority. Chamber of Commerce of the U.S., *et al.* v. U.S. Dep't of Labor, *et al.*, 885 F.3d 360 (5th Cir. 2018).

[19] 17 CFR Part 240, *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Rel. No. 34-86031 (June 5, 2019).

[20] *See, e.g.,* Renae Merle, "SEC Adopts Rules Requiring Brokers to Put Customers' Interests Above Their Own. Advocates Say It Won't Protect Customers," *The Washington Post*, (June 5, 2019), available at *www.washingtonpost.com/business/2019/06/05/wall-street-just-scored-another-big-victory-trump-administration/*.

[21] Commissioner Robert J. Jackson Jr., "Statement on Final Rules Governing Investment Advice," June 5, 2019, available at *https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd*.

[22] Melanie Waddell, "Have Fiduciary Standards Been 'Watered Down'? SEC's Clayton, Jackson Go Toe to Toe," *Think Advisor*, (Sept. 24, 2019), available at *https://www.thinkadvisor.com/2019/09/24/have-fiduciary-standards-been-watered-down-secs-clayton-jackson-go-toe-to-toe/?slreturn=20191015150543*.

[23] In July 2019, the House of Representatives passed an amendment that would block enforcement of Regulation BI, Amendment to Financial Services and General Government Appropriations Act of 2020, H.R. 3351, available at *https://amendments-rules.house.gov/amendments/SECMAJA6--REVISED%20AMENDMENT624190937483748.pdf*, and in September, the attorneys general of seven states plus the District of Columbia filed suit against the SEC to vacate the rule, arguing that the SEC's adoption of Regulation BI violated the Administrative Procedure Act. State of New York, *et al.* v. SEC, *et al.*, No. 1:19-cv-08365 (S.D.N.Y. Sept. 9, 2019). Moreover, states including Massachusetts, New Jersey and Nevada have proposed rules that would render Regulation BI superfluous by imposing a fiduciary standard for broker-dealers. *See* Greg Iacurci, "SEC Sued by Seven States to Kill Reg BI Investment-Advice Rule," *Investment News*, (Sept. 10, 2019), available at *https://www.investmentnews.com/article/20190910/FREE/190919999/sec-sued-by-seven-states-to-kill-reg-bi-investment-advice-rule*.

[24] Lorenzo v. SEC, 139 S. Ct. 1094 (2019).

[25] Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011).

[26] *Id.* at 142.

[27] Rule 10b-5 provides:

It shall be unlawful for any person …,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

17 CFR § 240.10b-5.

[28] *Lorenzo*, 139 S. Ct. at 1099.

[29] *Id.*

[30] *Id.*

[31] *See id.*

[32] *See id.* at 1100.

[33] *Id.* at 1101 (citing 17 CFR § 240.10b-5).

[34] *Id.* at 1111 (Thomas, J., dissenting) (quoting *id.* at 1101).

[35] *See* Malouf v. SEC, 933 F.3d 1248, 1254 (10th Cir. 2019) (finding investment advisor liable under Rule 10b-5(a) and (c) for failing to correct knowing misrepresentations disseminated by his company).

[36] *Lorenzo*, 139 S. Ct. at 1110 (Thomas, J., dissenting).

[37] *Id.* at 1103.

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

[39] *Id.* at 473.

[40] *Id.* at 472–473 (citing 15 U.S.C. § 80b-7).

[41] *Id.* at 480.

[42] *Id.* at 479 (explaining the standard set forth in *Wonsover v. SEC*, 205 F.3d 408, 413–415 (D.C. Cir. 2000)).

[43] *Wonsover*, 205 F.3d at 414.

[44] *Robare*, 922 F.3d at 479.

[45] *See id.*

[46] *Id.*

[47] Kokesh v. SEC, 137 S. Ct. 1635 (2017).

[48] *See id.* at 1643–1644; Lisa Wood, *et al.*, "Securities and Exchange Commission Year in Review," *The Investment Lawyer*, Vol. 25, No. 1 Jan. 2018, pp. 3-4.

[49] U.S. Securities and Exchange Commission, *supra* n.1, p. 21.

[50] *Id.*

[51] Dave Michaels, "SEC Wants More Power to Get Funds Back for Bilked Investors," *Wall St. J.*, (June 21, 2018), available at *https://www.wsj.com/articles/sec-wants-more-power-to-get-funds-back-for-bilked-investors-1529622404*.

[52] Rachel Graf, "Supreme Court to Review SEC's Right to Seek Disgorgement," *Law 360*, (November 1, 2019), available at *https://www.law360.com/securities/articles/1216162/supreme-court-to-review-sec-s-right-to-seek-disgorgement*.

[53] SEC v. Liu, 754 Fed. Appx. 505 (9th Cir. 2018).

[54] *See id.* at 506.

[55] *Id.*

[56] *See id.* at 507, 509.

[57] 15 U.S.C. § 77t(d); §§ 78u(d)(1), (3), (5).

[58] *See Kokesh,* 137 S. Ct. at 1640.

[59] *See Liu*, 754 Fed. Appx. at 509.

[60] Debra Cassens Weiss, "Can the SEC order disgorgement in civil enforcement cases? Supreme Court agrees to decide," *ABA Journal*, (November 6, 2019), available at *http://www.abajournal.com/news/article/can-the-sec-order-disgorgement-in-civil-enforcement-cases-supreme-court-agrees-to-decide*.

[61] Securities and Exchange Commission, *supra* n.1.

[62] *See, e.g.*, SEC v. Radius Capital Corp., No. 2:11-cv-116-FtM-29MRM, 2017 U.S. Dist. LEXIS 127557 (M.D. Fla. Aug. 11, 2017).

[63] Hazel Bradford, "Senate proposal would give SEC more tools to seek restitution for investors," *Pensions & Investments*, (March 14, 2019), available at *https://www.pionline.com/article/20190314/ONLINE/190319922/senate-proposal-would-give-sec-more-tools-to-seek-restitution-for-investors*.

[64] *See https://www.congress.gov/bill/116th-congress/senate-bill/799*.

[65] *See* Ted Godbout, "House Committee Moves to Bolster SEC Enforcement Regime," *National Association of Plan Advisors*, (July 18, 2019), available at *https://www.napa-net.org/news-info/daily-news/house-committee-moves-bolster-sec-enforcement-regime*.

[66] US House Committee on Financial Services Press Releases, "Committee Passes 8 Bills to Protect Consumers and Investors," (July 16, 2019), available at *https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=404097*.

[67] *See* Andrew Kragie, "House OKs SEC Disgorgement Power Up To 14 Years," *Law 360*, Nov. 19, 2019, available at *https://www.law360.com/securities/articles/1220824/house-oks-sec-disgorgement-power-up-to-14-years*.

[68] *See https://www.congress.gov/bill/116th-congress/house-bill/3641* (H.R. 3641); *https://www.congress.gov/bill/116th-congress/house-bill/3701* (H.R. 3701); *https://www.congress.gov/bill/116th-congress/house-bill/4344* (H.R. 4344).

[69] Lucia v. SEC, 138 S. Ct. 2044 (2018).

[70] *Id.* at 2055.

[71] *Id.* at 2051; *id.* at 2059, 60 (Breyer, J., dissenting) (discussing the applicability of *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), to the Commission's administrative regime).

[72] Joel Nolette, "Post-*Lucia*, It's Déjà Vu With The SEC," *Law 360* (April 22, 2019), available at *https://www.law360.com/articles/1151580/post-lucia-it-s-deja-vu-with-the-sec*.

[73] William Yeatman, "Article III Court Should Hear Challenge to SEC's Unconstitutional Enforcement Proceedings," *Cato Institute*, (June 18, 2019), available at *https://www.cato.org/blog/article-iii-court-should-hear-challenge-secs-unconstitutional-enforcement-proceedings*.

[74] Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).

[75] *See id.* at 207 (internal quotation marks omitted); Nolette, *supra* n.72.

[76] *See* Raymond J. Lucia Cos. v. United States SEC, No. 18-cv-2692 DMS (JLB), 2019 U.S. Dist. LEXIS 143906 (S.D. Cal. Aug. 21, 2019); Cochran v. United States SEC, No. 4:19-CV-066-A, 2019 U.S. Dist. LEXIS 49751 (N.D. Tex. Mar. 25, 2019).

[77] Cochran v. SEC, No. 19-10396, 2019 U.S. App. LEXIS 29032 (5th Cir. Sept. 24, 2019).

[78] *See Thunder Basin*, 510 U.S. at 212-13 (internal citations and quotation marks omitted).

[79] Yeatman, *supra* n.73.

[80] Securities and Exchange Commission, *supra* n.1, p. 21.

[81] Alison Frankel, "Cato sues SEC over 'gag rule' barring defendants from protesting allegations after settlement," *Reuters*, (January 9, 2019), available at *https://www.reuters.com/article/legal-us-otc-sec/cato-sues-sec-over-gag-rule-barring-defendants-from-protesting-allegations-after-settlement-idUSKCN1P32J0*.

[82] Chairman Jay Clayton, "Statement Regarding Offers of Settlement," (July 3, 2019), available at *https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement*.

[83] *See* Robert J. Anello and Richard F. Albert, "SEC's Reboot on Waiver Requests In Enforcement Settlements," *New York Law Journal*, (October 10, 2019), available at *https://www.law.com/newyorklawjournal/2019/10/09/secs-reboot-on-waiver-requests-in-enforcement-settlements/*.

[84] Clayton, *supra* n.82.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Anello & Albert, *supra* n.83.

[89] Securities and Exchange Commission, *supra* n.1, p. 8.

[90] *See, e.g.*, Jason Zuckerman and Matthew Stock, "SEC Proposes Amendments to SEC Whistleblower Rules," *Zuckerman Law Whistleblower Protection Law Blog*, (October 18, 2019), available at *https://www.zuckermanlaw.com/amendments-sec-whistleblower-rules/*; Max de Haldevang, "Wall Street's watchdog wants to weaken its own whistleblower program, critics say," *Quartz*, (October 22, 2019), available at *https://qz.com/1730082/critics-say-sec-changes-to-whistleblower-program-will-weaken-it/*.

[91] Securities and Exchange Commission, *supra* n.1, p. 8.

[92] Press Release 2019-42, "SEC Awards $50 Million to Two Whistleblowers," (March 26, 2019), available at *https://www.sec.gov/news/press-release/2019-42*.

[93] *See* Press Release 2019-81, "SEC Awards $3 Million to Joint Whistleblowers," (June 3, 2019), available at *https://www.sec.gov/news/press-release/2019-81*; Press Release No. 2019-76, "SEC Awards $4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Act," (May 24, 2019), available at *https://www.sec.gov/news/press-release/2019-76*.

[94] Securities and Exchange Commission, *supra* n.1, p. 8.

[95] Press Release 2019-227, "SEC Charges Issuer and CEO with Violating Whistleblower Protection Laws to Silence Investor Complaints," (November 4, 2019), available at *https://www.sec.gov/news/press-release/2019-227*.

[96] Press Release 2018-120, "SEC Proposes Whistleblower Rule Amendments," (June 28, 2018), available at *https://www.sec.gov/news/press-release/2018-120*.

[97] Zuckerman & Stock, *supra* n.90.

[98] *Id.*

[99] *See id.*

[100] Mary Jane Wilmoth and Maya Efrati, "NWC Meets with SEC to Strongly Oppose 'Caps' on SEC Whistleblower Rewards," *Whistleblower Protection Blog*, (December 18, 2018), available at *https://www.whistleblowersblog.org/2018/12/articles/dodd-frank-whistleblowers/nwc-meets-sec-oppose-caps-sec-whistleblower-rewards/*.

[101] Haldevang, *supra* n.90.

[102] Tinker Ready, "SEC meeting on changes to whistleblower program cancelled," *Whistleblower Protection Blog*, (October 23, 2019), available at *https://www.whistleblowersblog.org/2019/10/articles/whistleblower-news/sec-meeting-on-changes-to-whistleblower-program-cancelled/*.

[103] US Securities and Exchange Commission, *supra* n.1, pp. 15, 24, 28.

104 *See* Wood, *supra* n.48, p. 11.

105 Daniel M. Hawke, "SEC Data Analysis in Insider Trading Investigations," *CLS Blue Sky Blog*, (August 21, 2019), available at *http://clsbluesky.law.columbia.edu/2019/08/21/sec-data-analysis-in-insider-trading-investigations/*.

106 *See id.*

107 Press Release 2019-152, "SEC Wins Jury Trial Against Broker Charged with Insider Trading," (August 14, 2019), available at *https://www.sec.gov/news/press-release/2019-152*.

108 Litigation Release No. 24375, "SEC Charges Husband of Investment Banker with Insider Trading," (December 17, 2018), available at *https://www.sec.gov/litigation/litreleases/2018/lr24375.htm*.

109 Litigation Release No. 24462, "SEC Obtains Asset Freeze in Connection with Alleged Insider Trading," (April 29, 2019), available at *https://www.sec.gov/litigation/litreleases/2019/lr24462.htm*.

110 Press Release No. 2019-53, "SEC Charges Former SeaWorld Associate General Counsel With Insider Trading," (April 9, 2019), available at *https://www.sec.gov/news/press-release/2019-53*.

111 Dirks v. SEC, 463 U.S. 646, 662 (1983).

112 *See id.*

113 *Id.* at 664.

114 United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).

115 Salman v. United States, 137 S. Ct. 420, 427–428 (2016).

116 United States v. Martoma, 894 F.3d 64 (2d Cir. 2018). The Second Circuit had issued a prior opinion in the case in 2017 holding that *Salman* abrogated *Newman*'s "meaningfully close personal relationship" standard altogether. United States v. Martoma, 869 F.3d 58 (2d Cir. 2017). It subsequently amended that opinion, holding that the evidence supported Martoma's conviction on other grounds, and therefore, that it was unnecessary to reach the viability of the *Newman* standard. (*See* discussion in main text *infra*.)

117 *Id.* at 69.

118 *Id.* at 70.

119 *Id.* at 74, 78.

120 Gupta v. United States, 913 F.3d 81 (2d Cir. 2019).

121 *Id*. at 86–87.

122 *Id.* at 76 (quoting United States v. Newman, 773 F.3d 438, 449 (2d Cir. 2014)).

123 U.S. v. Lee, No. 13-cr-00539 (S.D.N.Y. June 21, 2019) (Slip Op.)

124 *See id.*

125 *See https://www.congress.gov/bill/116th-congress/house-bill/2534/all-actions*.

126 John C. Coffee, Jr., "Prof. Coffee Testifies on Insider Trading Legislation Before the House Financial Services Subcommittee on Investor Protection," *The CLS Blue Sky Blog*, (April 3, 2019), available at *http://clsbluesky.law.columbia.edu/2019/04/03/putting-investors-first-reviewing-proposals-to-hold-executives-accountable/*.