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## SEC Enforcement Developments of Note for Mutual Funds and Their Advisers: The Year in Review and a Look Ahead

Over the past 12 months, the Securities and Exchange Commission (SEC or Commission) has kept up the aggressive enforcement pace it set in previous years, establishing new single-year highs in fiscal year (FY) 2016 for SEC enforcement actions generally and those involving investment advisers and/or investment companies.<sup>1</sup> The Commission's Division of Enforcement (Enforcement or the Division) has continued to emphasize several key programmatic areas, including most notably its record-setting effort to encourage whistleblowers. By contrast, enforcement actions of particular note to the mutual fund industry have been relatively uncommon, with a noted absence of prior-year matters involving distribution-in-guise, the 15(c) process and chief compliance officers.<sup>2</sup> Instead, valuation has taken center stage.

Before the presidential election, it would have been reasonable to expect more of the same in FY2017 from Enforcement generally, and perhaps an uptick in actions of interest to mutual funds, especially in light of the significant increase in staff responsible for investment adviser and investment company examinations at the SEC's Office of Compliance Inspections and Examinations (OCIE), Enforcement's active whistleblower initiative and relatively new leadership settling in at the Division's Asset Management Unit (AMU).<sup>3</sup> With the election of President Donald J. Trump, however, all bets are now off.<sup>4</sup>

At this point, neither the President nor his nominee for Chairman of the SEC, Walter J. "Jay" Clayton, has commented specifically on the Commission's enforcement program.<sup>5</sup> But a potential harbinger of Enforcement's future appeared in late February, when Acting Chairman Michael S. Piwowar reportedly rescinded the Director of Enforcement's subdelegation of authority to issue formal orders of investigation, which had permitted Enforcement staff in such investigations to issue subpoenas for documents and testimony.<sup>6</sup> And others close to the new Administration have been vocal in their criticism of certain aspects of the SEC's enforcement program, such as corporate penalties.<sup>7</sup> In addition, the SEC may feel a pinch to its budget — the House Financial Services Committee is reportedly likely to reject the Commission's FY2018 budget request (which called for a \$445 million increase),<sup>8</sup> and there are suggestions further cuts may be in the offing.<sup>9</sup> Finally, since Jan. 23, there is also a hiring freeze in place for federal civilian employees.<sup>10</sup>

It is difficult to predict where things will begin, not to mention end, once a new Chairman, two additional SEC Commissioners and a new Director of Enforcement are on the scene. For now, please read on for a review of the events of last year, and keep this Alert handy for a comparison next March.

### Aggressive Enforcement: The Tail End of a Trend?

**Enforcement Statistics.** The SEC filed 868 enforcement actions and obtained orders exceeding \$4 billion in monetary sanctions in FY2016.<sup>11</sup> The number of enforcement actions represented a record for the agency, while the amount of monetary sanctions came in somewhat below the totals

achieved in FY2014 (\$4.16 billion) and FY2015 (\$4.19 billion). Independent actions (i.e., enforcement actions other than (1) those against issuers for delinquent SEC filings and (2) follow-on administrative proceedings seeking bars against individuals based on criminal convictions, civil injunctions or other orders) continued to remain a point of emphasis. In FY2016, the SEC filed 548 such actions, an increase of 8 percent after year-over-year highs in FY2015 and FY2014. In its press release announcing the statistics, the Commission also highlighted that it had set new single-year highs for cases involving investment advisers or investment companies (160) and independent or stand-alone cases involving investment advisers or investment companies (98).

**Coordination With OCIE.** The Division of Enforcement continues to work closely with OCIE. Last October, former OCIE Director Mark Wyatt even described the Division as a “customer” of the examination process.<sup>12</sup> Commission press releases announcing enforcement actions that arise out of OCIE examinations routinely credit each team member by name.<sup>13</sup>

In FY2016, OCIE completed over 2,400 examinations across all of its program areas, representing a more than 20 percent increase over FY2015.<sup>14</sup> As in FY2015, OCIE referred roughly 10 percent of its examinations to Enforcement.<sup>15</sup> While the referral percentage may not change, the number of referrals is likely to increase, as OCIE has bolstered staffing in its investment adviser/investment company examination program by roughly 20 percent.<sup>16</sup> OCIE has also emphasized the development of a risk-based strategy for evaluating which registrants to examine, supported by the development of specialized data analytics,<sup>17</sup> allowing it to “arrive at the list of firms [OCIE] believe[s] expose investors to the most significant risks.”<sup>18</sup>

OCIE’s examination priorities for 2017 include three directly related to mutual fund advisers: (1) money market funds, (2) exchange-traded funds (ETFs) and (3) the ReTIRE initiative.<sup>19</sup> OCIE will examine money market funds for compliance with the 2014 rule amendments, which became effective in October 2016. Examinations will likely include assessments of board oversight of fund compliance with these new amendments as well as a review of compliance policies and procedures relating to stress testing and periodic fund reporting of information to the SEC. OCIE will examine ETFs for compliance with applicable exemptive relief granted under the Securities Exchange Act of 1934 (“1934 Act”) and the 1940 Act and with other regulatory requirements, as well as review ETFs’ unit creation and redemption processes. Under the multiyear ReTIRE initiative, OCIE’s examinations in the coming year will focus on, among other things, the sales and management of target date funds.

In a recent risk alert, OCIE also noted the five compliance topics most frequently identified in deficiency letters sent to SEC-registered investment advisers.<sup>20</sup> The topics were (1) the Compliance Rule, (2) regulatory filings, (3) the Custody Rule,

(4) the Code of Ethics Rule and (5) the Books and Records Rule. OCIE also issued a risk alert in October 2016, concerning its examination of registrants’ compliance with key whistleblower provisions arising out of the Dodd-Frank Act in a variety of documents, including compliance manuals, codes of ethics, employment agreements and severance agreements.<sup>21</sup> If history is any guide going forward, the mutual fund industry can expect some of OCIE’s referrals to Enforcement in FY2017 to cover these topics.

**Whistleblowers.** In August 2016, the SEC announced that awards to whistleblowers since the beginning of the program had surpassed the \$100 million mark.<sup>22</sup> In FY2016, the program issued awards totaling over \$57 million, exceeding the sum of all award amounts issued in previous years.<sup>23</sup> The Commission’s FY2016 awards included payouts for a tip that “substantially advanced the agency’s investigation and ultimate enforcement action”;<sup>24</sup> for a well-detailed tip where “it would have been extremely difficult for law enforcement to discover this securities fraud on its own”;<sup>25</sup> to a company outsider who conducted a detailed analysis that led to a successful SEC enforcement action;<sup>26</sup> to a whistleblower who came forward with “information that enabled the SEC to move quickly and initiate an enforcement action against wrongdoers before they could squander the money”;<sup>27</sup> and for providing a tip “which bolstered an ongoing investigation with additional evidence of wrongdoing that strengthened the SEC’s case” (the first such award).<sup>28</sup> As of Jan. 23, total payouts under the whistleblower program stood at roughly \$149 million paid to 41 whistleblowers in enforcement actions that resulted in more than \$935 million in financial remedies.<sup>29</sup>

The increasing size and frequency of these awards reflect the seriousness with which the SEC views the whistleblower program. Indeed, last September, former Director of Enforcement Andrew Ceresney spoke of the “transformative impact that the program has had on the Agency, both in terms of the detection of illegal conduct and in moving our investigations forward quicker and through the use of fewer resources.”<sup>30</sup> With the number of tips in FY2016 growing to 4,218, up from 3,923 in FY2015 and 3,620 in FY2014, we can expect a continued uptick in whistleblower-generated actions for some time, even if the scope of whistleblower protections is eventually narrowed.<sup>31</sup>

In addition, the SEC made protecting its whistleblowers a point of emphasis in FY2016, bringing two settled actions under the anti-retaliation provisions of the Dodd-Frank Act<sup>32</sup> and no less than eight settled actions against companies for violating Rule 21F-17, which prohibits anyone from taking any action to impede communications with the SEC about possible securities law violations.<sup>33</sup> The Commission brought a first-of-its-kind stand-alone retaliation case against a company.<sup>34</sup> The SEC followed this up with another first, when it settled with another company for retaliating against an internal whistleblower.<sup>35</sup> By far, the most common violation of 21F-17 came in the form of

separation agreements constraining an employee's interactions with the SEC. For example, an asset manager agreed to pay a \$340,000 civil money penalty to settle charges that it improperly used separation agreements in which exiting employees were forced to waive their ability to obtain whistleblower awards,<sup>36</sup> while a technology company agreed to pay a \$180,000 civil money penalty for routinely entering into severance agreements that contained a broad non-disparagement clause forbidding former employees from engaging with the SEC and other regulators "in any communication that disparages, denigrates, maligns or impugns" the company.<sup>37</sup>

**Admissions.** The SEC has continued to demand admissions in connection with certain settled enforcement actions.<sup>38</sup> As of November 2016, the SEC had obtained admissions from 77 defendants and respondents — 30 individuals and 47 entities.<sup>39</sup> The admissions policy is expected to survive the transition in leadership to the new Presidential administration, but admissions may be sought less frequently or the Commissioners may become more involved in the process of when to seek an admission.<sup>40</sup>

## Enforcement and the Mutual Fund Industry

**Improper Fair Valuation, Misleading Disclosures Regarding Remediation and Improper Affiliated Transaction.** In October, the SEC brought and settled an administrative proceeding against an investment adviser for improperly fair valuing certain mutual fund bond holdings held by the funds of registered investment companies it advised and failing to disclose key aspects of its attempt to remediate the resulting harm.<sup>41</sup>

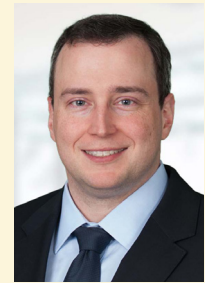
The investment adviser primarily relied on a third-party analytical tool for its fair valuation calculations and failed to incorporate market data or back-test the fair value determinations for the bonds. The valuation errors resulting from these practices led to the funds being priced at an inaccurate net asset value (NAV). The mutual funds then executed shareholder transactions at the wrong NAV, and stated inaccurate performance figures. In addition, the adviser collected inflated asset-based fees.

The adviser and the funds attempted remediation but failed to follow the fund's NAV error correction procedures. They then compounded the issue by failing to disclose to investors and prospective investors that the initial deviation did not conform to the NAV error correction procedures or that the process compensated shareholders differently, depending on whether they invested directly or through an intermediary. Upon discovering the mistake, the adviser contributed \$27 million to the funds it advised to distribute to accountholders of record. However, the adviser based its contribution on an estimate and did not precisely calculate fund and shareholder losses in accordance with the funds' error correction procedures. As a result, some shareholders were undercompensated.

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The adviser also caused a mutual fund it advised to engage in a securities transaction with another fund it sub-advised, without meeting the requirements for an exemption from the prohibitions against transactions between affiliated persons. The adviser failed to timely report the transaction to the fund's Board of Trustees, and the Board did not evaluate the transaction within the time period set by Rule 17a-7(e)(3) under the Investment Company Act. As a result, the transaction did not meet the conditions required for an exemption under Section 17(a) of the Investment Company Act.

The funds had previously adopted written inter-portfolio transaction, NAV error correction, and valuation policies and procedures that were updated on an annual basis. However, the adviser failed to properly implement these policies and procedures and, in particular, did "not ensure that the policies and procedures were reasonably designed to establish appropriate controls related to its reliance on a third-party analytical tool in fair valuing securities."

As a result of this conduct, the SEC found the adviser liable for violating Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-8 thereunder, and Sections 17(a) and 34(b) of the Investment Company Act and Rules 22c-1 and 38a-1 thereunder.

The adviser agreed to the following: a cease-and-desist order, a censure, to conduct a self-administered distribution as further remediation intended to make the affected shareholders whole, and to pay a civil money penalty of \$3.9 million.

**Fair Valuation Practices for Mutual Fund Holdings of Pre-IPO Securities.** Beginning in late 2015 and continuing through at least the late summer of 2016, the SEC reportedly expanded the scope of a previously ongoing investigation of mutual funds' fair valuation practices for pre-IPO securities.<sup>42</sup> Former Chair White discussed the motive for this investigation in a speech in 2016, noting that inflated or ethereal valuations harm not

only venture capital and private equity funds, “but also smaller retail investors and the next Stanford student whose great idea needs funding, but investors are unwilling to take a bet on her because they were burned last time.”<sup>43</sup> Chair White also indicated companies known as unicorns (private startup firms with valuations exceeding \$1 billion) were an area of special concern as “one must wonder whether the publicity and pressure to achieve the unicorn benchmark is analogous to that felt by public companies to meet projections they make to the market with the attendant risk of financial reporting problems.”<sup>44</sup> The investigation has not yet led to any public enforcement actions.

**Misleading Performance and Inadequate Fair Valuation.** In December 2016, the SEC brought and settled an administrative proceeding with an investment management firm to resolve charges the firm both misled investors about the performance of one of its first actively managed ETFs and failed to accurately value certain fund securities.<sup>45</sup>

The ETF achieved record performance following its initial launch through a strategy of purchasing smaller-sized positions in non-agency mortgage-backed securities known as “odd lots.” The firm engaged in this strategy “to help bolster performance out of the gate.”<sup>46</sup> But in monthly and annual reports to investors, the firm “provided other, misleading reasons for the ETF’s early success and failed to disclose that the resulting performance from the odd lot strategy was not sustainable as the fund grew in size.”<sup>47</sup> As a result of these actions, the firm “misled investors about the true long-term impact of its odd lot strategy and denied them the opportunity to make fully formed investment decisions.”<sup>48</sup> The firm also failed to disclose the existence and impact of the odd lot strategy to the ETF Trust’s Board of Trustees.

The odd lot strategy also caused the ETF to overvalue its portfolio and consequently fail to accurately price a subset of fund shares. The firm valued the bonds using prices provided by a third-party pricing vendor for round lots, which are larger-sized bonds compared with odd lots, and the firm’s pricing policies and procedures were not reasonably designed to consider these issues or odd lot pricing in general. The policies and procedures also vested responsibility with the firm’s traders for determining when to report to the firm’s Pricing Committee any price that did not reasonably reflect market value, but failed to provide for sufficient oversight of the traders’ determinations or any guidance regarding when to elevate significant pricing issues.

As a consequence of the foregoing conduct, the SEC found the investment firm to have violated Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder, and Section 34(b) of the Investment Company Act. The investment firm also caused the ETF’s violation of Rule 22c-1 of the Investment Company Act.

The investment firm agreed to a cease-and-desist order, a censure, \$1.5 million of disgorgement and prejudgment interest,

and a civil money penalty of \$18.3 million. It also agreed to employ an independent compliance consultant to conduct a comprehensive review of the written compliance policies and procedures implicated by the conduct at issue in this matter.

**Policies and Procedures on Outside Consultants’ Use of MNPI.** In May 2016, the SEC brought and settled an administrative proceeding against an investment adviser for mutual funds for failure to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information (MNPI) in connection with the adviser’s use of outside consultants as part of its securities research and analysis services provided to the funds.<sup>49</sup> One of these consultants served as a member of four outside public company boards and, as a result of such service, had access to MNPI regarding these companies. During the period in question, the funds were shareholders of, and traded in the securities of, these four companies.

The investment adviser had written policies and procedures regarding MNPI and policies and procedures addressing the personal trading activities of individuals who had access to confidential information regarding its funds, but it did not establish or maintain written policies or procedures for identifying outside consultants who should be subject to oversight and controls carried on by its compliance department. As a result of this gap, the adviser’s written policies and procedures were not reasonably designed to prevent the misuse of MNPI with respect to outside consultants.

The SEC found the investment adviser’s conduct violated Section 204A of the Advisers Act. The adviser agreed to a cease-and-desist order, a censure and a civil money penalty of \$1.5 million.

**Failure to Disclose Key Terms in Exemptive Order Application.** In August 2016, the SEC brought and settled an administrative proceeding against an investment adviser for omissions of material fact in an application for exemptive relief and other disclosures filed with the SEC.<sup>50</sup> The adviser’s funds filed an exemptive order application with the SEC that disclosed a side agreement with its lead subadvisor. The side agreement provided for termination payments should the adviser recommend the subadvisor’s termination for something other than cause. The Division of Investment Management informed the adviser it would not support the application with the termination payment provisions, and the adviser and funds agreed to remove the provisions in an amended application. However, in the interim, the adviser had agreed with the subadvisor to waive its ability to terminate, or recommend the termination of, the subadvisor altogether. Neither the advisor nor the funds disclosed the revised side agreement in the amended application or in the registration statements of the funds. The registration statements of the funds also inaccurately stated that all of the subadvisory agreements could be terminated at any time by the adviser.



The SEC found the investment adviser's conduct violated Section 34(b) of the Investment Company Act and caused the funds' violations of the same. The investment adviser agreed to a cease-and-desist order, a censure and a \$75,000 civil money penalty.

### **Inadequate Safeguards and Supervision at a Transfer Agent.**

Continuing its focus on gatekeepers, just last month, the SEC brought and settled an administrative proceeding against a transfer agent for failing to implement adequate safeguards and procedures to protect customer funds and securities, and for failing to supervise an employee who stole approximately \$1.2 million worth of mutual funds from investors.<sup>51</sup>

The employee obtained sensitive account information regarding foreign deceased shareholders and falsified documents to cause securities from two accounts to be transferred to an account he controlled. He subsequently liquidated the securities and wired the funds to another account he controlled. The transfer agent discovered the misappropriation when the legitimate legal representative of one of the victim's estates submitted redemption forms applicable to the account that had already been closed. Upon discovering this conduct, the transfer agent made both shareholder accounts whole, referred the employee to federal law enforcement and subsequently recovered all of the misappropriated funds.

While the transfer agent had policies and procedures in place to safeguard customer funds and securities, they were inadequate. The policies and procedures required a business justification be provided when an employee requested the details of shareholder accounts, but there was no mechanism that would determine whether the business justification was legitimate. The transfer agent also failed to evaluate which additional safeguards and procedures were necessary to protect accounts with a "stop code," which included those belonging to foreign deceased shareholders. Finally, the transfer agent failed to reasonably supervise its employee through adequate supervisory policies and procedures.

The SEC found the transfer agent's conduct violated Sections 17A(d)(1) and 17A(c)(3) of the Exchange Act and Rule 17Ad-12 thereunder. The transfer agent agreed to a cease-and-desist order, a censure and payment of a \$250,000 civil money penalty.

## **The Future of SEC Enforcement**

What will the enforcement landscape look like a year from now? It is certainly fair to expect that cutting-edge enforcement theories may not be as well-received by the new Commission and Director of Enforcement, and that borderline cases fit for a "broken windows" approach may no longer be in vogue. But efforts to fight fraud and other enforcement staples are likely to remain, if for no other purpose than to serve as a counterweight to further cuts elsewhere within the SEC, some of which have already been telegraphed.<sup>52</sup> Moreover, even if additional

attempts to slow the pace of new enforcement investigations are successful, it will take some time to work through the current pipeline of already-active matters.

In any event, the political process alone cannot predetermine the future of the Commission's enforcement program. Indeed, with most enforcement actions taking the form of settlements, including those grabbing the headlines and those discussed above, what may be lost amid the current political handicapping is the very real and ongoing risk that federal court challenges will deliver significant blows to the program. For example, in the past year, the 10th and 11th Circuits split over whether the five-year limitation period in 28 U.S.C. § 2462 applies to the SEC's ability to obtain disgorgement, with the 11th Circuit finding the five-year limitation applied to limit disgorgement and the 10th Circuit holding the opposite.<sup>53</sup> The Supreme Court will hear oral argument on the 10th Circuit case in April 2017. Potentially even more significant is the vigorous litigation over the SEC's use of administrative law judges (ALJs) appointed by the Commission. Although many commentators thought the D.C. Circuit settled the issue in August,<sup>54</sup> the 10th Circuit came through with another Circuit split in December when it found that the ALJs were inferior officers subordinate to the SEC commissioners and held their offices unconstitutionally.<sup>55</sup> Then, in February, the D.C. Circuit vacated its decision and indicated it would consider the issue *en banc*. These and similar cases will make for an interesting year and may impact SEC enforcement more significantly than any politically generated rollback efforts. ■

<sup>1</sup> FY2016 is the 12-month period ended Sept. 30, 2016.

<sup>2</sup> For last year's alert, please see Gregory D. DiMeglio, Lawrence P. Stadulis and Zachary T. Knepper, SEC Enforcement Developments Regarding Mutual Funds: The Year in Review (March 2016), <http://www.stradley.com/insights/publications/2016/03/fund-alert-sec-enforcement-developments-march-2016>.

<sup>3</sup> See Press Release 2016-47, *Anthony Kelly Named Co-Chief of Asset Management Unit* (March 10, 2016), <https://www.sec.gov/news/pressrelease/2016-47.html>; Press Release 2016-134, *C. Dabney O'Riordan Named as Co-Chief of the Asset Management Unit* (June 28, 2016).

<sup>4</sup> See *id.*

<sup>5</sup> Chairman nominee Clayton previously was the chairman of a committee that authored a report discussing "the significant direct and indirect effects on companies subject to the FCPA [Foreign Corrupt Practices Act] as well as knock-on effects on the U.S. markets more generally." New York City Bar Committee on International Business Transactions, *The FCPA and its Impact on International Business Transactions — Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* (December 2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>. The

article called for an assessment of (1) the ability of the United States to prevent worldwide corruption unilaterally and (2) the direct and indirect costs of continuing such an effort. *See also* Andrew Ramonas, *Trump's SEC Pick: FCPA Causes 'Lasting Harm' for U.S. Companies*, BNA (Jan. 9, 2017), <https://bol.bna.com/trumps-sec-pick-fcpa-causes-lasting-harm-for-u-s-companies/>.

<sup>6</sup> For additional information about the history of the subdelegation of formal order authority, the criticism of such subdelegation and the response to its rescindment, *see* Sarah N. Lynch, *SEC's acting chair scales back enforcement unit's subpoena powers*, Reuters (Feb. 16, 2017), <http://www.reuters.com/article/us-usa-sec-enforcement-idUSKBN15V2PI>; SEC Release No. 34-60448, *Delegation of Authority to Director of Division of Enforcement* (Aug. 11, 2009), <https://www.sec.gov/rules/final/2009/34-60448.pdf>; SEC Release No. 34-62690, *Delegation of Authority to the Director of its Division of Enforcement* (Aug. 16, 2010), <https://www.sec.gov/rules/final/2010/34-62690.pdf>; Commissioner Michael S. Piwowar, Speech, *Remarks to the Los Angeles County Bar Association Securities Regulation Seminar* (Nov. 22, 2013) (“However, I question whether the processes currently in place are sufficient for the Commission to exercise the appropriate level of oversight of the formal order process”); Bradley J. Bondi, *A Questionable Delegation of Authority: Did the SEC Go Too Far When It Delegated Authority to the Division of Enforcement to Initiate an Investigation?* (Sept. 20, 2016), <http://centerforfinancialstability.org/wp/2016/09/20/a-questionable-delegation-of-authority-did-the-sec-go-too-far-when-it-delegated-authority-to-the-division-of-enforcement-to-initiate-an-investigation/>; *but c.f.* Beagan Wilcox Volz, *SEC Enforcement Changes Mean More Red Tape, Frustrated Staff, Ignites* (Feb. 23, 2017) (former co-director of the Division of Enforcement has argued that this represents “a huge step backwards” and would “introduce a layer of inefficiency and bureaucracy into an organization that needs less of both”).

<sup>7</sup> *See* Sarah N. Lynch and Lisa Lambert, *Trump ignites political fight over U.S. banking law reforms*, Reuters (Feb. 3, 2017), <http://www.reuters.com/article/us-usa-trump-wealth-fiduciary-idUSKBN151199>.

<sup>8</sup> *See* Carmen Germaine, *Financial Services Committee Slams SEC's Budget Plans*, Law360 (Feb. 27, 2017), <https://www.law360.com/articles/895958/financial-services-committee-slams-sec-s-budget-plans>.

<sup>9</sup> *See* Carmen Germaine, *SEC's Belt To Tighten Under New Administration*, Law360 (Feb. 28, 2017), <https://www.law360.com/securities/articles/896600/sec-s-belt-to-tighten-under-new-administration>.

<sup>10</sup> *See Presidential Memorandum Regarding the Hiring Freeze* (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze>.

<sup>11</sup> Press Release 2016-212, *SEC Announces Enforcement Results for FY 2016* (Oct. 11, 2016), <https://www.sec.gov/news/pressrelease/2016-212.html>.

<sup>12</sup> Mark Wyatt, Speech, *Inside the National Exam Program in 2016* (Oct. 17, 2016), <https://www.sec.gov/news/speech/inside-the-national-exam-program-in-2016.html> (“Wyatt speech”).

<sup>13</sup> For example, *see* the enforcement actions cited in endnotes 41 and 45, below.

<sup>14</sup> Wyatt speech.

<sup>15</sup> *Id.*

<sup>16</sup> Wyatt speech. OCIE accomplished this by redirecting headcount from its broker-dealer examination program. *See SEC Launches New FINRA Inspection Team*, ThinkAdvisor (Oct. 17, 2016), <http://www.thinkadvisor.com/2016/10/17/sec-launches-new-finra-inspection-team>.

<sup>17</sup> This emphasis on “Big Data” ties into a larger, Commission-wide focus on developing and deploying better analytics. *See* Commissioner Kara M. Stein, Speech, *A Vision for Data at the SEC* (Oct. 28, 2016); Scott W. Bauguess, Speech, *Has Big Data Made Us Lazy?* (Oct. 21, 2016), <https://www.sec.gov/news/speech/bauguess-american-accounting-association-102116.html>; Rick A. Fleming, Speech, *Improving Disclosure with Smart Data* (Oct. 24, 2016), <https://www.sec.gov/news/speech/improving-disclosure-with-smart-data.html>.

<sup>18</sup> Wyatt speech.

<sup>19</sup> *Examination Priorities for 2017* (Jan. 12, 2017), <https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf>. Other examination priorities of note include (1) share class selection, (2) wrap fee programs and (3) cybersecurity.

<sup>20</sup> *National Exam Program Risk Alert* (Feb. 7, 2017), <https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf>.

<sup>21</sup> *National Exam Program Risk Alert* (Oct. 24, 2016), <https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf>.

<sup>22</sup> Press Release 2016-173, *SEC Whistleblower Program Surpasses \$100 Million in Awards* (Aug. 30, 2016), <https://www.sec.gov/news/pressrelease/2016-173.html>.

<sup>23</sup> *See 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (Nov. 15, 2016) at p. 23, <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf> (“Whistleblower Office Annual Report”).

<sup>24</sup> Press Release 2016-114, *SEC Issues \$17 Million Whistleblower Award* (June 9, 2016), <https://www.sec.gov/news/pressrelease/2016-114.html>.

<sup>25</sup> Press Release 2016-172, *\$22 Million Whistleblower Award for Company Insider Who Helped Uncover Fraud* (Aug. 30, 2016), <https://www.sec.gov/news/pressrelease/2016-172.html>.

<sup>26</sup> Press Release 2016-10, *SEC Awards Whistleblower More Than \$700,000 for Detailed Analysis* (Jan. 15, 2016), <https://www.sec.gov/news/pressrelease/2016-10.html>.

<sup>27</sup> Press Release 2016-237, *SEC Issues \$20 Million Whistleblower Award* (Nov. 14, 2016), <https://www.sec.gov/news/pressrelease/2016-237.html>.

<sup>28</sup> Press Release, 2016-88, *Whistleblower Earns \$3.5 Million Award for Bolstering Ongoing Investigation* (May 13, 2016), <https://www.sec.gov/news/pressrelease/2016-88.html>.

<sup>29</sup> Press Release 2017-27, *SEC Announces \$7 Million Whistleblower Award* (Jan. 23, 2017), <https://www.sec.gov/news/pressrelease/2017-27.html>.

<sup>30</sup> See Andrew Ceresney, Speech, *The SEC's Whistleblower Program: The Successful Early Years* (Sept. 14, 2016), <https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html>.

<sup>31</sup> See Whistleblower Office Annual Report at p. 23. The FY2016 total does not include “an unusually high number of tips” that were received from a single individual. *Id.*

<sup>32</sup> Press Release 2016-270, *Company Settles Charges in Whistleblower Retaliation Case* (Dec. 20, 2016), <https://www.sec.gov/news/pressrelease/2016-270.html> (“Press Release 2016-270”); Press Release 2016-204, *SEC: Casino-Gaming Company Retaliated Against Whistleblower* (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-204.html>. As is typically the case, the respondents in these proceedings and the other proceedings discussed in this Alert consented to the SEC’s Order on a “no admit or deny” basis.

<sup>33</sup> See Press Release 2017-24, *Financial Company Charged With Improper Accounting and Impeding Whistleblowers* (Jan. 19, 2017), <https://www.sec.gov/news/pressrelease/2017-24.html>; Press Release 2017-14, *BlackRock Charged With Removing Whistleblower Incentives in Separation Agreements* (Jan. 17, 2017) (“Press Release 2017-14”), <https://www.sec.gov/news/pressrelease/2017-14.html> (this action was brought by the AMU); Press Release 2016-270, *Company Settles Charges in Whistleblower Retaliation Case* (Dec. 20, 2016), <https://www.sec.gov/news/pressrelease/2016-270.html>; Press Release 2016-268, *Company Violated Rule Aimed at Protecting Potential Whistleblowers* (Dec. 19, 2016) (“Press Release 2016-268”), <https://www.sec.gov/news/pressrelease/2016-268.html>; Press Release 2016-196, *SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws* (Sept. 28, 2016), <https://www.sec.gov/news/pressrelease/2016-196.html>; Press Release 2016-164, *Company Punished for Severance Agreements That Removed Financial Incentives for Whistleblowing* (Aug. 16, 2016), <http://www.sec.gov/news/pressrelease/2016-164.html>; Press Release 2016-157, *Company Paying Penalty for Violating Key Whistleblower Protection Rule* (Aug. 10, 2016), <https://www.sec.gov/news/pressrelease/2016-157.html>; Press Release 2016-128, *Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk* (June 23, 2016), <https://www.sec.gov/news/pressrelease/2016-128.html>; see also Press Release 2015-54, *SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements* (Apr. 1, 2015), <https://www.sec.gov/news/pressrelease/2015-54.html> (first such enforcement action).

<sup>34</sup> See Press Release 2016-204 (whistleblower with several years of positive performance reviews fired because employee reported to senior management and SEC that the company’s financial statements might be distorted).

<sup>35</sup> See Press Release 2016-270 (company replaced whistleblower had expressed concerns about internal calculation of publicly reported oil-and-gas reserves).

<sup>36</sup> See Press Release 2017-14.

<sup>37</sup> See Press Release 2016-268.

<sup>38</sup> Under a policy announced by former Chair Mary Jo White in 2013, the SEC may require admissions from a respondent where a large number of investors were harmed or conduct was otherwise egregious, conduct posed a significant risk to the markets or investors, the respondent poses a potential future threat, admissions would significantly enhance the deterrence message of the enforcement action, or a respondent obstructed the SEC’s investigative process. See Dave Michaels, *SEC Says It Will Seek Admissions of Wrongdoing More Often*, Bloomberg (June 19, 2013), <http://www.bloomberg.com/news/articles/2013-06-18/sec-to-seek-guilt-admissions-in-more-cases-chairman-white-says>; see also Andrew Ceresney, Speech: *Remarks to the American Bar Association’s Business Law Section Fall Meeting* (Nov. 21, 2014), <https://www.sec.gov/News/Speech/Detail/Speech/1370543515297>.

<sup>39</sup> See Chair Mary Jo White, Speech, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016), <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>. Since this speech, the SEC has obtained an admission from another individual and two more entities. See Litigation Release No. 23758, *SEC Obtains Final Judgment Against Operator of California-Based Oil and Gas Offering Fraud and Relief Defendants* (Feb. 24, 2017), <https://www.sec.gov/litigation/litreleases/2017/lr23758.htm>.

<sup>40</sup> See Carmen Germaine, *Trump’s SEC Likely To Shrink Back Where White’s Expanded*, Law360 (Nov. 16, 2016), <https://www.law360.com/articles/863225/trump-s-sec-likely-to-shrink-back-where-white-s-expanded>.

<sup>41</sup> See *In the Matter of Calvert Investment Management, Inc.* (Oct. 18, 2016), <https://www.sec.gov/litigation/admin/2016/ia-4554.pdf>. This action arose out of an OCIE examination.

<sup>42</sup> See Anthony Zeoli, *SEC Launches Probe of Pre-IPO Tech Stock Sales Transactions*, Crowdfund Insider (July 14, 2015), <https://www.crowdfundinsider.com/2015/07/71105-sec-launches-probe-of-pre-ipo-tech-stock-sales-transactions/>; Susan Pulliam and Telis Demos, *SEC Steps Up Probe of Pre-IPO Share Trading*, The Wall Street Journal (Dec. 1, 2015), <https://www.wsj.com/articles/sec-steps-up-probe-of-pre-ipo-share-trading-1449020518>; *These Mutual Funds Have Been Juicing Their Returns With Unicorn Stakes*, Fortune (Aug. 11, 2016), <http://fortune.com/2016/08/11/mutual-funds-returns-unicorns/>.

<sup>43</sup> Chair Mary Jo White, Speech, *Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative* (March 31, 2016), <https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html>.

<sup>44</sup> *Id.*

<sup>45</sup> See Press Release 2016-252, *PIMCO Settles Charges of Misleading Investors About ETF Performance* (Dec. 1, 2016) (“Press Release 2016-252”), <https://www.sec.gov/news/pressrelease/2016-252.html>. This action arose out of an OCIE examination and was conducted by the AMU.

<sup>46</sup> Press Release 2016-252.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Administrative Summary 3-17264, *Fund Adviser Settles Charges Relating to Oversight of Consultant Relationships* (May 27, 2016), <https://www.sec.gov/litigation/admin/2016/ia-4401-s.pdf> (brought by the Division of Enforcement’s Market Abuse Unit).

<sup>50</sup> See Administrative Summary 3-17506, *SEC Charges Investment Adviser with Failing to Disclose Key Terms in Exemptive Order Application* (Aug. 25, 2016), <https://www.sec.gov/litigation/admin/2016/ia-4513-s.pdf> (brought by AMU).

<sup>51</sup> See Administrative Summary 3-17840, *Transfer Agent Settles Charges Alleging Inadequate Safeguards and Procedures that Failed to Prevent*

*Theft of More Than \$1 Million in Investor Funds* (Feb. 10, 2017), <https://www.sec.gov/litigation/admin/2017/34-80016-s.pdf> (crediting assistance from broker-dealer and investment adviser examination programs).

<sup>52</sup> See, e.g., Acting Chairman Michael S. Piwowar, Public Statement, *Reconsideration of Conflict Minerals Rule Implementation* (Jan. 31, 2017), available at: <https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html>; see also Acting Chairman Michael S. Piwowar, Public Statement, *Reconsideration of Pay Ratio Rule Implementation* (Feb. 6, 2017), <https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html>.

<sup>53</sup> See *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) and *SEC v. Kokesch*, 834 F.3d 1158 (10th Cir. 2016, cert. granted Jan. 13, 2017). The 1st Circuit and the D.C. Circuit have previously issued opinions in agreement with the 10th Circuit; see *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010).

<sup>54</sup> See *Raymond J. Lucia Cos. Inc. v. SEC*, 832 F.3d 277 (DC Cir. 2016), reh’g en banc petition granted (DC Cir. Feb. 16, 2017).

<sup>55</sup> See *Bandimere v. SEC*, 2016 WL 7439007 (10th Cir. 2016).

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