Labaton Sucharow

SEC WHISTLEBLOWER ADVOCATES

SEC Insider's Guide:

A Guide to the SEC's Investigative and Enforcement Process

In addition to the information contained in this Guide, we encourage readers to visit our website to review Frequently Asked Questions about the SEC Whistleblower Program, the securities laws enforced by the SEC and our Firm.

Table of Contents

SEC Insider's Guide

A GUIDE TO THE SEC'S INVESTIGATIVE AND ENFORCEMENT PROCESS

Labaton Sucharow was the first, and remains the only, law firm to establish a national practice focused exclusively on representing SEC whistleblowers. Collectively, our team brings more than a century of time-tested, real-world federal law enforcement experience to our SEC whistleblower advocacy. Our practice leader, a principal architect of the SEC Whistleblower Program, and members of our team previously held senior positions within the SEC, and led hundreds of successful SEC enforcement actions and related DOJ prosecutions. We have cultivated important relationships and in-the-trenches knowledge of what drives successful enforcement actions. As a low-volume, ultra-selective practice winning precedent-setting whistleblower awards, we offer our clients sophisticated counsel driven by a highly disciplined qualitative and quantitative analytical approach. Successfully reporting securities violations is a high-stakes, complex process. This guide serves as an introduction to the structure and operations of the SEC, as well as topics related to investigations and enforcement actions.

I. Overview of the SEC

A. Introduction and Mission

The mission of the Securities and Exchange Commission (the "SEC" or "Commission") is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. An independent federal agency established pursuant to the Securities and Exchange Act of 1934 (the "Exchange Act" or the "'34 Act"), the SEC was designed to enforce the Exchange Act and the Securities Act of 1933 (the "Securities Act" or "'33 Act"). In the wake of the Great Depression, these acts were created to restore investor confidence in the capital markets.

The Commission is empowered with broad authority over all aspects of the securities industry. This includes the power to investigate and prosecute violations of the securities laws, as well as the power to regulate and oversee brokerage firms, transfer agents, clearing agencies, and stock exchanges, such as the New York Stock Exchange and NASDAQ.

In particular, the SEC's responsibilities are to:

- interpret the federal securities laws;
- issue new rules and amend existing rules;
- oversee the inspection of securities firms, brokers, investment advisors, and ratings agencies;
- oversee private regulatory organizations in the securities, accounting, and auditing fields; and
- coordinate U.S. securities regulation with federal, state, and foreign authorities.

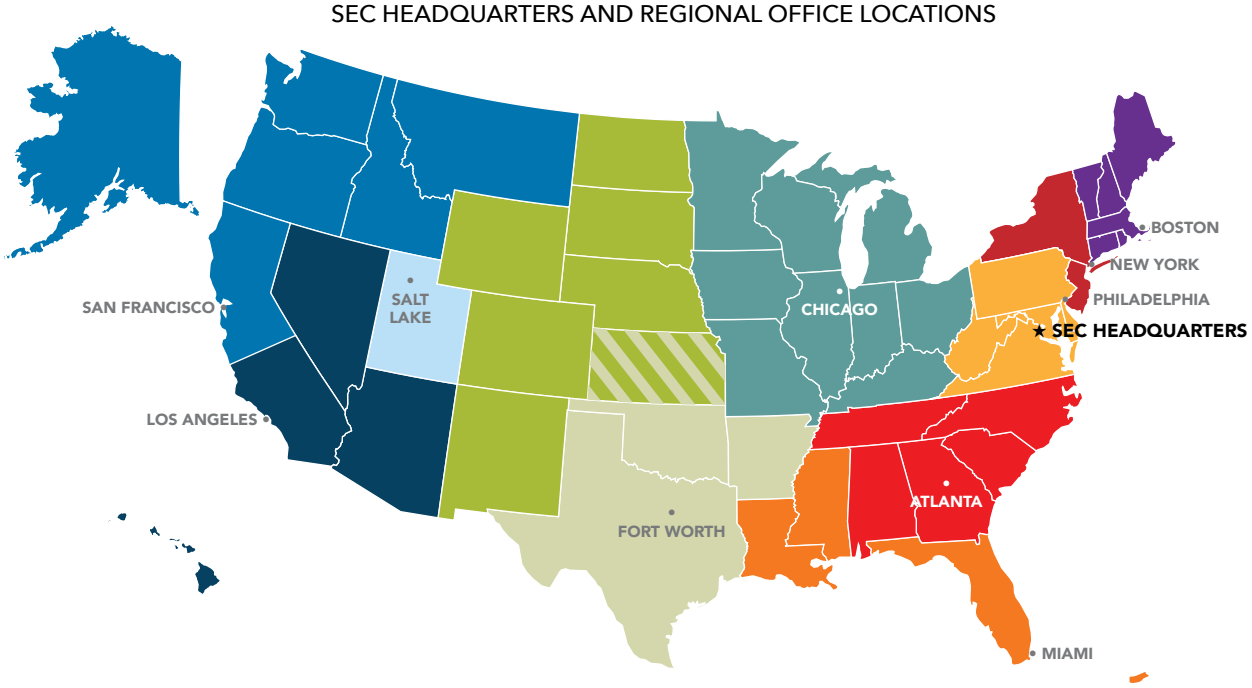
B. Organization of the SEC

The SEC is headed by a bi-partisan five-member Commission, comprised of a Chairman and four Commissioners. All members are appointed by the President, confirmed by the Senate and serve staggered 5-year terms. The Chairman serves as the Commission's Chief Executive Officer. The SEC is headquartered in Washington, D.C.

The SEC is organized into five main divisions and 24 offices headquartered in Washington, D.C. The five main divisions are: Corporate Finance; Investment Management; Trading and Markets; Risk, Strategy, and Financial Innovation; and Enforcement.

The SEC also has 11 regional offices in the following cities: New York; Boston; Philadelphia; Atlanta; Miami; Chicago; Denver; Fort Worth; Salt Lake City; San Francisco; and Los Angeles. The regional offices investigate and litigate potential violations of the securities laws. The regional offices also employ examination staff, who examine and investigate regulated entities such as investment advisers, investment companies and broker-dealers. Their jurisdiction extends to surrounding areas as follows:

SEC HEADQUARTERS AND REGIONAL OFFICE LOCATIONS



★ **SEC HEADQUARTERS**

● **ATLANTA REGIONAL OFFICE**
GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, TENNESSEE, ALABAMA

● **BOSTON REGIONAL OFFICE**
CONNECTICUT, MAINE, MASSACHUSETTS, NEW HAMPSHIRE, VERMONT, RHODE ISLAND

● **CHICAGO REGIONAL OFFICE**
ILLINOIS, INDIANA, IOWA, KENTUCKY, MICHIGAN, MINNESOTA, MISSOURI, OHIO, WISCONSIN

● **DENVER REGIONAL OFFICE**
COLORADO, KANSAS, NEBRASKA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, WYOMING

● **FORT WORTH REGIONAL OFFICE**
TEXAS, OKLAHOMA, ARKANSAS
(EXCEPT FOR THE EXAM PROGRAM WHICH IS ADMINISTERED BY THE DENVER REGIONAL OFFICE)

● **LOS ANGELES OFFICE**
ARIZONA, HAWAII, GUAM, NEVADA, SOUTHERN CALIFORNIA
(ZIP CODES 93599 AND BELOW, EXCEPT FOR 93200-93299)

● **MIAMI REGIONAL OFFICE**
FLORIDA, MISSISSIPPI, LOUISIANA, U.S. VIRGIN ISLANDS, PUERTO RICO

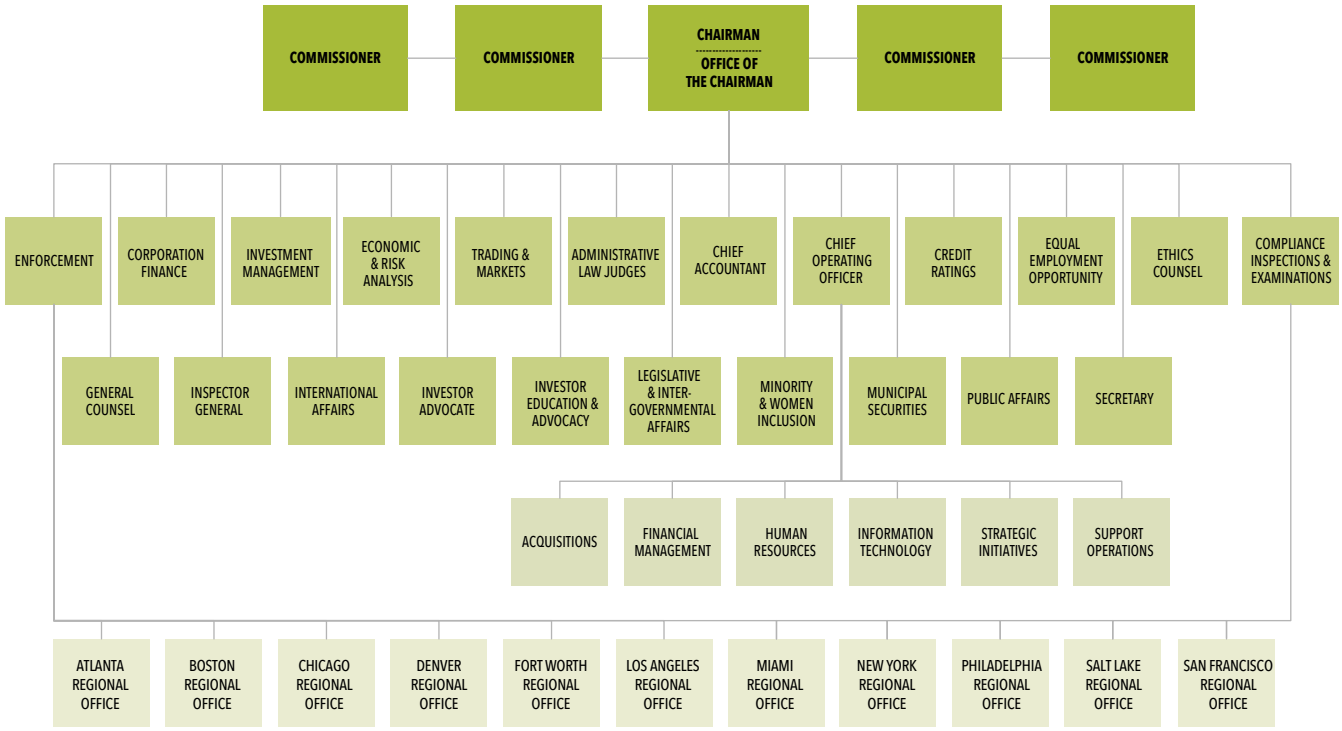
● **NEW YORK REGIONAL OFFICE**
NEW YORK, NEW JERSEY

● **PHILADELPHIA REGIONAL OFFICE**
DELAWARE, MARYLAND, PENNSYLVANIA, VIRGINIA, WEST VIRGINIA, DISTRICT OF COLUMBIA

● **SALT LAKE REGIONAL OFFICE**
UTAH

● **SAN FRANCISCO REGIONAL OFFICE**
WASHINGTON, OREGON, ALASKA, MONTANA, IDAHO, NORTHERN CALIFORNIA
(ZIP CODES 93600 AND UP, PLUS 93200-93299)

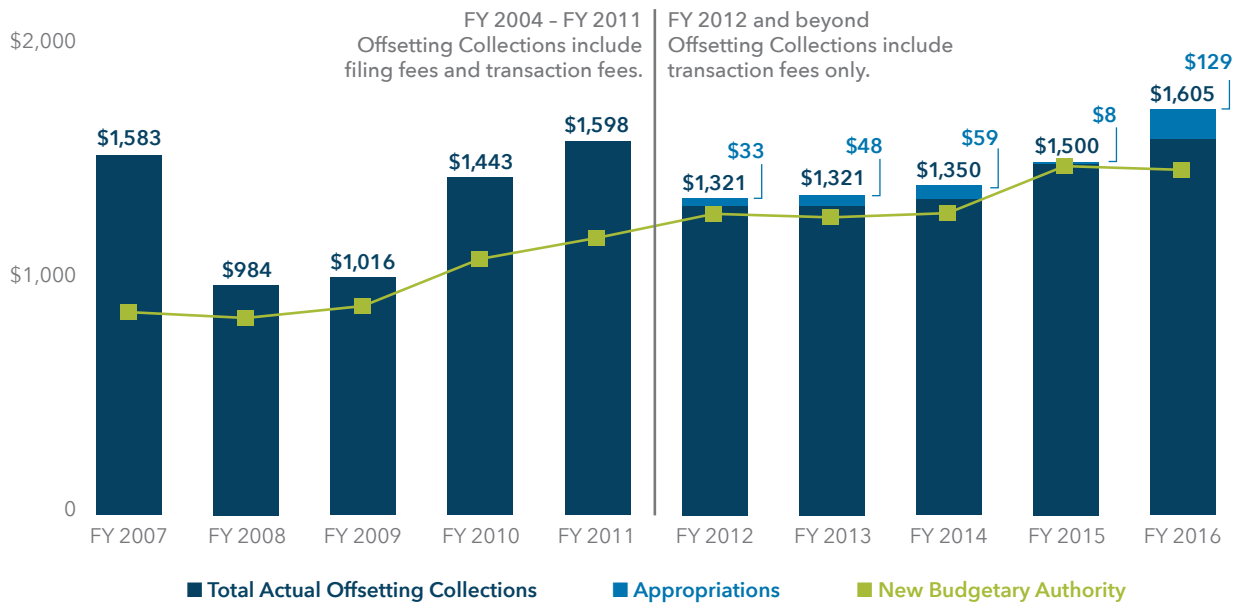
The current SEC organization chart looks like this:



Source: https://www.sec.gov/images/secorg.pdf.

In fiscal year 2016, the SEC's total budgetary resources amounted to $1.9 billion, a 10% increase over the preceding fiscal year. The majority of the SEC's spending was on personnel compensation and benefits; the agency employed a staff of 4,554 full-time equivalents (FTEs), including 4,404 permanent and 150 other-than-permanent FTEs in FY 2016. Additional spending primarily consisted of contractual services and supplies, and acquisitions of assets. The SEC's spending is almost entirely offset by its collections each fiscal year, and FY 2016 was no exception:

OFFSETTING COLLECTIONS VS. NEW BUDGETARY AUTHORITY SECTION 31 EXCHANGE AND FILING FEES
(DOLLARS IN MILLIONS)



C. SEC Divisions

1. Division of Corporation Finance

The Division of Corporation Finance assists the Commission in overseeing corporate disclosure of important information to the investing public. Under the securities laws, publicly-held companies must disclose important information to investors when their stock is initially sold, and on a continuing and periodic basis thereafter. This division's staff routinely reviews these disclosure documents, which include:

- registration statements for newly-offered securities;
- annual and quarterly filings (Forms 10-K and 10-Q);
- proxy materials sent to shareholders before an annual meeting;
- annual reports to shareholders;
- documents concerning tender offers;[1] and
- filings related to mergers and acquisitions.

These documents disclose information about a company's financial condition and business practices to help investors make informed investment decisions. During the review process, the division's staff checks to see if publicly-held companies are meeting their disclosure requirements and seeks to improve the quality of the disclosure. In general, a company issuing securities or whose securities are publicly traded must make available all information, whether it is positive or negative, that might prove relevant to an investor's decision to buy, sell, or hold the security.

The Division of Corporation Finance also provides administrative interpretations of the '33 Act, the '34 Act, and the Trust Indenture Act of 1939, and recommends regulations to implement these statutes. In addition, this division provides guidance and counseling to registrants, prospective registrants, and the public to help them comply with the law. For example, a company might ask whether the offering of a particular security requires registration with the SEC, and receive a reply from staff providing the division's interpretation of relevant securities regulations and advice on compliance with disclosure requirements.

Another responsibility of the Division of Corporation Finance is, together with the SEC's Office of the Chief Accountant, to monitor the activities of the accounting profession, particularly the Financial Accounting Standards Board (FASB), the organization responsible for establishing generally accepted accounting principles (GAAP). All financial statements disclosed by U.S. companies must conform with GAAP.

2. Division of Investment Management

The Division of Investment Management is responsible for investor protection and for promoting capital formation through its oversight and regulation of America's approximately $67 trillion investment-management industry. The investment-management industry includes mutual funds and the professional fund managers who advise them; analysts who research individual assets and asset classes; and investment advisers to individual customers.

This division is also responsible for:

- assisting the Commission in interpreting laws and regulations for the public and for SEC inspection and enforcement staff;
- responding to no-action requests and requests for exemptions;

1 A tender offer is an offer to buy a large number of shares of a corporation, usually at a premium above the current market price.

- reviewing investment company and investment adviser filings;
- assisting the Commission in enforcement matters involving investment companies and advisers; and
- advising the Commission on adapting SEC rules to new circumstances.

3. Division of Trading and Markets

The Division of Trading and Markets is responsible for maintaining fair, orderly, and efficient markets by providing day-to-day oversight of the major securities market participants, such as: the securities exchanges (i.e., the New York Stock Exchange and NASDAQ); securities firms; the Financial Industry Regulatory Authority ("FINRA"); the Municipal Securities Rulemaking Board; transfer agents (parties that maintain records of securities owners); securities information processors; and credit rating agencies (e.g., Moody's and Standard & Poor's).

This division also oversees the Securities Investor Protection Corporation, a private, non-profit corporation that insures the securities and cash in the customer accounts of member brokerage firms against the failure of those firms (but not losses arising from market declines or fraud).

Additional responsibilities include:

- carrying out the SEC's financial integrity program for broker-dealers;
- reviewing (and in some cases approving, under authority delegated from the Commission) proposed new rules and proposed changes to existing rules filed by self-regulatory organizations ("SROs");[2]
- assisting the Commission in establishing rules and issuing interpretations on matters affecting the operation of the securities markets; and
- surveilling the markets.

4. Division of Economic and Risk Analysis

Established in September 2009, the Division of Economic and Risk Analysis helps identify developing risks to and trends in the financial markets. The emergence of derivatives, hedge funds, new technology, and other factors have transformed both capital markets and corporate governance. This division works to advise the Commission through an interdisciplinary approach informed by law, modern finance and economics, and developments in real world products and practices on Wall Street and Main Street.

Among the functions performed by this division are:

- Analyzing the potential economic effects of Commission rulemakings or other actions;
- providing quantitative and qualitative research and support related to risk assessment; and
- assisting the Division of Enforcement (see below) by, for example, providing economic and quantitative analysis and support in enforcement proceedings and settlement negotiations.

5. Division of Enforcement

The Division of Enforcement acts as the law enforcement arm of the SEC. This division recommends, as appropriate, that the SEC commence investigations of securities law violations and bring civil enforcement actions in federal court or before an administrative law judge, and prosecutes these cases on behalf of the Commission. As an adjunct to the SEC's civil enforcement authority, the Division of Enforcement also works closely with law enforcement agencies in the U.S. and around the world to bring criminal cases when appropriate.

2 There are numerous SROs under the SEC's oversight. FINRA is perhaps the most well-known, but the major securities exchanges are also SROs. Other examples include joint industry plans, futures exchanges and associations, clearing agencies and the MSRB.

D. Other Important Offices

In addition to the five major divisions, additional offices provide vital support to the Commission. A few important offices are briefly discussed below.

1. Office of the General Counsel

The Office of the General Counsel serves as the chief legal officer of the Commission and has overall responsibility for the establishment of agency policy on legal matters. Further, the General Counsel is the chief legal advisor to the Chairman, and provides legal advice to the Commissioners, the divisions, and all other offices and SEC components. The General Counsel also represents the SEC, primarily as its appellate counsel and in amicus curiae filings, and in Chapter 11 bankruptcy cases involving companies with a significant number of public security holders and raising issues of significance.

2. Office of Compliance Inspections and Examinations

This office conducts the SEC's examinations of registered entities and persons such as investment advisers, investment companies, broker-dealers, self-regulatory organizations, transfer agents, and clearing agencies. The office conducts inspections to foster compliance with the securities laws, to detect violations of the law, and to keep the Commission informed of developments in the regulated community. When a deficiency is found, a "deficiency letter" identifying the problems that need correction is issued and the situation is monitored until compliance is achieved. Deficiencies that are too serious for informal correction are referred to the Division of Enforcement.

3. Office of International Affairs

The Office of International Affairs assists the Chairman and the Commission in the development and implementation of the SEC's international regulatory and enforcement initiatives. It negotiates bilateral and multilateral agreements with international regulatory agencies for Commission approval on such subjects as regulatory cooperation and enforcement assistance, and oversees the implementation of such arrangements. It is also responsible for advancing the Commission's agenda in international meetings and organizations. Finally, it also conducts an assistance program for countries with emerging securities markets, which includes training both in the United States and in the requesting country. Over 100 countries currently participate in this program.

II. The SEC's Law Enforcement Arm: the Division of Enforcement

A. Overview

The Division of Enforcement was created in August 1972 to consolidate enforcement activities previously handled by the various operating divisions at the SEC's headquarters in Washington D.C. As the Commission's largest division, its mission is to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions in federal court or in administrative proceedings. In FY 2016, the SEC's enforcement activity resulted in ordered recoveries totaling over $4 billion.

ENFORCEMENT RESULTS: FISCAL YEARS 2014-2016			
FISCAL YEAR	**2014**	**2015**	**2016**
INDEPENDENT OR STANDALONE ENFORCEMENT ACTIONS	413	507	584
FOLLOW-ON APs	232	168	195
DELINQUENT FILINGS	110	132	125
TOTAL ACTIONS	**755**	**807**	**868**
DISGORGEMENT AND PENALTIES ORDERED	**$4.16 BILLION**	**$4.19 BILLION**	**OVER $4 BILLION**

B. How the Securities Laws Are Enforced

1. Investigations

The process of enforcing the securities laws begins with an investigation into a possible violation. The Division of Enforcement continually handles a substantial number of investigations that vary in size, complexity, and importance. Devoting appropriate resources to investigations that are more significant helps to ensure high quality investigations and maximize desired program outcomes. To identify and make effective decisions regarding matters of potential significance, the Director of the Division of Enforcement or his or her designees deem certain investigations as "National Priority Matters," which are more heavily staffed.

Evidence of possible violations of the securities laws comes from many sources, including market surveillance activities, investor tips and complaints, other divisions and offices of the SEC, the self-regulatory organizations and other securities industry sources, and media reports. In addition, since the creation and implementation of the SEC Whistleblower Program, which was enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC receives many tips from individuals with knowledge of potential violations.

All SEC investigations are confidential. Facts are developed to the fullest extent possible through informal inquiry, interviewing witnesses, examining brokerage records, reviewing trading data, and other methods. With a formal order of investigation, the Division of Enforcement's staff may compel witnesses by subpoena to testify and/or produce books, records, and other relevant documents. Following an investigation, the staff present findings to the Commission for its review. The Commission can authorize the staff to file a case in federal court or bring an administrative action. In many cases, the Commission and the party charged decide to settle a matter without a trial.

2. Types of SEC Enforcement Actions

If, following an investigation, the Commission believes that there is sufficient evidence of a violation to warrant an enforcement action, the Commission will authorize the Division of Enforcement to file a civil action in federal court or to bring an administrative proceeding. Whether to bring a case in federal court or within the SEC before an administrative law judge (ALJ) often depends upon the type of sanction or relief that is being sought. For example, the Commission may bar someone from the brokerage industry in an administrative proceeding, but an order barring someone from acting as a corporate officer or director must be obtained in federal court. Often, when the misconduct warrants, the Commission will bring both proceedings.

Civil action: The Commission (via the Division of Enforcement) files a complaint with a U.S. District Court and asks the court for a sanction or remedy. Often, the SEC asks for a court order called an injunction, which prohibits any further acts or practices that violate the law or SEC rules. An injunction can also require audits, accounting for frauds, or special supervisory arrangements. In addition, the SEC can seek civil monetary penalties, or the return of illegal profits (disgorgement). The court may also bar or suspend an individual from serving as a corporate officer or director. A person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment.

Administrative action: The SEC can seek a variety of sanctions through the administrative-proceeding process. Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge (ALJ). The administrative law judge presides over a hearing and considers the evidence presented by the Division of Enforcement staff, as well as any evidence submitted by the subject of the proceeding (the "respondent"). Following the hearing, the ALJ issues an initial decision that includes findings of fact and legal conclusions. The initial decision also contains a recommended sanction. Both the staff and the respondent may appeal all or any portion of the initial decision to the Commission. The Commission may affirm the decision of the ALJ, reverse the decision, or remand it for additional hearings. Administrative sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement.

C. Specialized Units and Market Intelligence

In January 2010, the Division of Enforcement announced the creation of specialized units in five priority areas dedicated to particular highly specialized and complex areas of securities law. The units are each led by a senior officer ("Chief") who reports to the Director of the Division of Enforcement, and are staffed by members of home offices and regional offices across the country. Their purpose is to address the unique challenges facing the SEC and other law enforcement agencies in combating newer, more sophisticated, and more specialized types of securities fraud. Through enhanced training and improved access to specialists, unit members obtain increased understanding of particular markets, products and transactions. They use that expertise to adopt a more proactive approach to identifying conduct and practices ripe for investigation, to conduct those investigations with increased efficiency and effectiveness, and to share that expertise with all staff conducting investigations in these specialized areas throughout the Division of Enforcement.

The specialized units are:

- **Asset Management:** this unit focuses on investigations involving investment advisors, investment companies, hedge funds, and private equity funds;
- **Market Abuse:** this unit focuses on investigations involving large-scale market abuses and complex manipulation schemes by institutional traders, market professionals, and others;
- **Complex Financial Instruments:** this unit focuses on complex derivatives and financial products, such as swaps, structured notes, and collateralized debt obligations;
- **Foreign Corrupt Practices:** this unit focuses on violations of the Foreign Corrupt Practice Act, which prohibits U.S. companies from bribing foreign officials for government contracts and other business; and
- **Public Finance Abuse:** this unit focuses on misconduct in the large municipal securities market and in connection with public pension funds. Such misconduct includes offering and disclosure fraud; tax or arbitrage-driven fraud; pay-to-play and public corruption violations; public pension accounting and disclosure violations; and valuation and pricing fraud.

Also included within the Division of Enforcement is the Office of Market Intelligence, responsible for the collection, risk-weighing triage, referral and monitoring of the over 20,000 tips, complaints, and referrals that the SEC receives each year, as well as the Office of the Whistleblower (see Section IV, below).

The Division of Enforcement has also periodically established dedicated task forces in several areas, including: (1) the Financial Reporting and Audit Task Force; (2) the Microcap Fraud Task Force; (3) the Center for Risk and Quantitative Analytics; and (4) the Broker-Dealer Task Force. These groups provide the agency with enhanced firepower in their areas of expertise.

III. The Investigative Process

Congress has delegated an enormous degree of discretion to the SEC to conduct investigations. Under the Exchange Act, the SEC has the authority to conduct investigations "as it deems necessary to determine whether any person has violated, is violating, or about to violate" the federal securities laws. This authority includes the power to determine the scope of its investigations and the persons and entities subject to investigation. Commission decisions to initiate an investigation are not subject to judicial review.

A. Matters Under Inquiry

When the SEC receives information suggesting a possible securities law violation, it will often conduct a preliminary inquiry to determine whether the allegations should be examined in more detail. The issue will then become a Matter Under Inquiry ("MUI") and an MUI number will be assigned. Preliminary in nature, MUIs typically involve incomplete information. The threshold determination for opening a new MUI is low because their purpose is to permit gathering of additional facts to help evaluate whether an investigation would be an appropriate use of resources. Basic considerations in opening an MUI include:

- the statutes or rules potentially violated;
- the egregiousness of the potential violation;
- the potential magnitude of the violation;
- the potential losses involved or harm to an investor or investors;
- whether the potentially harmed group is particularly vulnerable or at risk;
- whether the conduct is ongoing;
- whether the conduct can be investigated efficiently and within the statute of limitations period; and
- whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct.

During the MUI period, the SEC will informally investigate the potential violation. An informal investigation is, generally, a request for voluntary cooperation in providing information to the SEC staff. While the subject individual or entity is under no obligation to comply with such a request, it is usually in that person's or entity's interest to do so, as the SEC may look more positively on that individual or entity and it could influence the ultimate decision about whether to issue a formal order of investigation.

Once a subject is contacted by the SEC, he/she/it is obligated to preserve relevant documents. The destruction of relevant documents in these circumstances could lead to charges of obstruction of justice. As a general rule of thumb, one should consider the potential relevance of the materials to the matters under inquiry, not the informal or formal nature of the inquiry, when deciding which materials to preserve or disclose. In addition, the SEC will usually request that certain documents be produced—turned over—to the Commission for review. The SEC may also request interviews of relevant individuals. However, the staff cannot compel an individual to give testimony, nor can it require or administer oaths or affirmations if testimony is given.

This information-gathering and related analysis should occur quickly. The Division of Enforcement holds that, in general, MUIs should be closed or converted to an investigation within sixty days. The decision to convert to an investigation will be based on a more detailed evaluation, involving the following threshold considerations:

(1) Do the facts suggest a possible violation of the federal securities laws involving fraud or other serious misconduct?

(2) If yes, is an investment of resources merited by: (a) the magnitude or nature of the violation, (b) the size of the victim group, (c) the amount of potential or actual losses to investors, (d) for potential insider trading, the amount of profits or losses avoided, or (e) for potential financial reporting violations, materiality? And

(3) If yes, is the conduct: (a) ongoing, or (b) within the statute of limitations period?

In addition to these threshold considerations, the following supplemental factors will be considered:

- Is there a need for immediate action to protect investors?
- Does the conduct affect the fairness or liquidity of the U.S. securities markets?
- Does the case involve a recidivist?
- Has the SEC or Division designated the subject matter a priority?
- Does the case fulfill a programmatic goal of the SEC and the Division?
- Does the case involve a possibly widespread industry practice worth addressing?
- Does the matter give the SEC an opportunity for visibility in a community lacking familiarity with the SEC or the protections afforded by the securities laws? And
- Does the case present a good opportunity to cooperate with other civil and criminal agencies?

B. Formal Investigations

If the decision is made to convert to an investigation (or to open an investigation independent of an MUI), a formal order of investigation ("Formal Order") will follow. A Formal Order generally describes the nature of the authorized investigation, and designates members of the SEC staff to act as officers of the Commission for the investigation, empowering them to issue subpoenas compelling production of documents or witness testimony.

Typically, formal investigations commence with a broad request for the production of documents covering a specified time period, as well as possible subpoenas. Negotiation can often narrow such document requests and subpoenas to prevent an undue burden and the production of irrelevant documents. After document collection, if the SEC staff have questions, they will frequently call witnesses to testify.

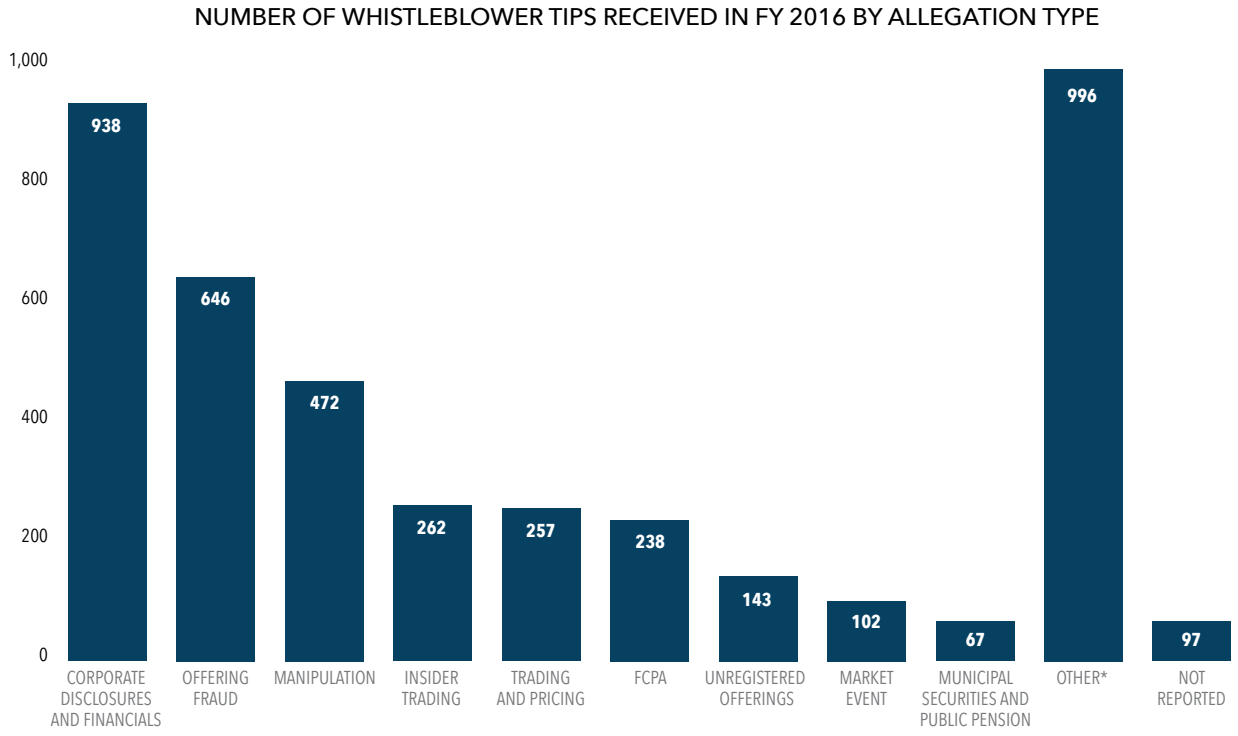
According to SEC rules, any person who is compelled to produce documents or testify in a formal investigation shall, upon request, be shown a copy of the Formal Order. A witness may also submit a written request for a copy of the Formal Order. The SEC staff is not required to provide a copy; rather, it is within their discretion to do so.

Formal investigative proceedings are always nonpublic unless otherwise ordered by the Commission.

IV. Sources of Investigations

A. Complaints and Tips From the Public

Many SEC investigations and enforcement actions result from complaints or tips provided by the public, a trend that has grown exponentially since the implementation of the Whistleblower Program.



This breakdown reflects the categories selected by whistleblowers and, thus, the data represents the whistleblower's own characterization of the violation type.

*The category of "Other" indicates that the submitter identified the whistleblower TCR as not fitting into any allegation category that is listed on the questionnaire.

With the enactment of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Congress directed the Commission to establish a program to pay monetary awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action, if the action yields monetary sanctions of over $1 million. The amount of the award is between 10 percent and 30 percent of the total monetary sanctions collected in an enforcement action or any related action such as in a criminal case. The exact amount is subject to the SEC's discretion and depends on various factors. Furthermore, Dodd-Frank expressly prohibits retaliation by employers against whistleblowers and provides whistleblowers with a private cause of action in the event that they are discharged or discriminated against by their employers. The SEC also regards retaliation or any attempt to silence a potential whistleblower as an independent violation under its jurisdiction, and can and has undertaken enforcement actions in such circumstances.

Public complaints and tips can be submitted through the SEC's online web form (http://www.sec.gov/complaint.shtml) or by mailing or faxing a Form TCR to the SEC Office of the Whistleblower.

The whistleblower program has demonstrated tremendous success. As of May 2017, whistleblower tips have yielded recoveries totaling more than $953 million, with approximately $153 million of that amount awarded to 43 qualifying whistleblowers.

B. Referrals From Self-Regulatory Organizations

The Division of Enforcement's Office of Market Intelligence serves as the primary point of contact for trading-related referrals by domestic SROs, such as stock exchanges. Each equity and option exchange is responsible for monitoring its own markets and enforcing exchange rules and regulations and the federal securities laws. If the SRO discovers potentially illegal conduct and believes it has jurisdiction, it will conduct its own investigation. If the SRO determines it lacks jurisdiction, it will refer the potential violations to the SEC.

C. Other Sources of Investigations

Investigations are triggered by numerous other sources, including independent reviews of company filings made with the SEC; inspections and examinations of broker-dealers, investment companies, and investment advisors; referrals from state securities agencies; media stories; and reviews of information retained in accordance with the Bank Secrecy Act.

V. Subpoenas of Documents and/or Testimony

A. The Power to Issue Subpoenas

Consistent with its expansive authority to investigate violations of the federal securities laws, the SEC has broad subpoena power. Upon the issuance of a Formal Order, the staff may request any information that is reasonably relevant to the investigation, including documents and the testimony of witnesses. The SEC may also issue subpoenas to other parties with potentially relevant information about the transactions under investigation, including banks, telephone companies, internet service providers, broker-dealers, and contract counterparties.

The SEC has the jurisdiction to issues subpoenas anywhere in the United States and may compel witnesses to appear at any designated place of hearing. In addition, the SEC cooperates with many foreign law enforcement agencies to obtain information located within the foreign jurisdictions.

B. Challenges to Subpoenas

A party receiving an SEC subpoena has few options to challenge it. The party could move to quash the subpoena in court, but such motions are rarely successful because courts generally hold that subpoena enforcement actions are the exclusive forum for challenging SEC subpoenas.

Subpoena enforcement actions are generally instituted by the Director of the Division of Enforcement when a recipient refuses to obey an SEC subpoena. There typically is no penalty for doing so, because SEC subpoenas are not self-enforcing. The SEC, however, takes such refusals very seriously, and this course is generally not advisable. The subpoena enforcement action essentially results in the full force of the law being conferred to the SEC subpoena, although it is within this proceeding that a recipient has the opportunity to raise challenges to the subpoena.

Common challenges to an SEC subpoena include that the subpoena is overbroad and seeks irrelevant material, that compliance with the subpoena would be unduly burdensome, and that the subpoena calls for privileged material. But courts take an expansive view of a federal agency's subpoena power, and the SEC need only show that: (i) its investigation will be conducted pursuant to a legitimate purpose; (ii) the inquiry may be relevant to that purpose; (iii) the information sought is not already within the SEC's possession; and (iv) all administrative steps required by law have been followed.

VI. Privacy and Confidentiality of Investigations

A. Confidentiality of Information

In general, it is the policy and practice of the SEC to keep confidential and nonpublic all information it obtains during the course of its investigations. Disclosure of this enforcement-related information to any person outside the SEC is permitted in only limited circumstances in accordance with applicable laws and regulations. For example, Section 24(c) of the Exchange Act permits the SEC to, in its discretion and upon showing need, provide records and other information in its possession to such persons as the Commission by rule deems appropriate, if the person receiving such records or information provides assurances of confidentiality. The SEC will sometimes provide information to other regulatory agencies or law enforcement authorities, such as the Department of Justice, to assist those other agencies or authorities in their own investigations into the subject conduct.

B. Freedom of Information Act

Under the Freedom of Information Act ("FOIA"), information and documents submitted to the SEC during an investigation may be disclosed to any member of the public who makes a valid request, unless one of the nine exceptions to disclosure applies. Some of the more relevant exceptions invoked by the SEC to deny a FOIA request are that the materials requested: (i) contain trade secrets or confidential business information; (ii) constitute inter/intra-agency communications; or (iii) were compiled for law enforcement purposes and their production would interfere with an ongoing enforcement proceeding.

To ensure maximum protection from disclosure of information under FOIA, a person submitting information to the SEC—either voluntarily or by subpoena—must request confidential treatment of that information. Information for which confidential treatment is requested must be (i) segregated from other information; (ii) clearly marked as confidential; and (iii) accompanied by a written request for confidential treatment, which specifies the information to be kept confidential. Requests for confidential treatment may be granted to protect personal privacy or sensitive business information, or based on any of the nine exceptions to disclosure specified in FOIA. If confidential treatment is granted, the information is protected from disclosure while the investigation or case remains open.

C. The Privacy Act of 1974

The Privacy Act of 1974 provides notice and protection to persons from whom a federal agency, including the SEC, requests information. The Privacy Act governs the procedures applicable to the SEC for obtaining, maintaining, and disseminating information obtained from individuals. The protections apply only to citizens of the United States or aliens lawfully admitted for permanent residence. The Privacy Act does not apply to corporations or non-citizens living abroad.

The Privacy Act requires the SEC to provide each individual asked to deliver information with a notice stating:

- the legal authority under which the information is requested and whether compliance is voluntary or mandatory;
- the principal purposes for which the information is sought;
- the "routine uses" which may be made of the information; and
- the potential consequences of not providing the information.

The Privacy Act also precludes the disclosure of information relating to an individual by the SEC without that individual's permission unless disclosure is expressly permitted by the Act. In addition, when the SEC does disclose the information, either pursuant to a statutorily-permissible reason or with permission, it must maintain a record of such disclosures, except when the information is disclosed to SEC officers and employees who have an official need for the information, or under FOIA.

D. Whistleblower Confidentiality

Confidentiality in investigations prompted by a whistleblower submission is also informed by Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u-6(h)(2), which forbids the SEC from disclosing information that could reasonably be expected to reveal the identity of a whistleblower except in limited circumstances. Exceptions include required disclosures in an enforcement action, cooperative efforts with other regulatory or law enforcement agencies (see Section XII, below), or pursuant to the Privacy Act. A whistleblower represented by counsel also has the option of submitting information anonymously.

VII. Privileges

The SEC's authority to conduct investigations and subpoena documents and witnesses, though broad, is subject to certain legal restraints. Most notable among them are the standard evidentiary privileges, such as the attorney-client privilege and the work-product doctrine.

A. Attorney-Client Privilege

Any witness who testifies in an SEC investigation can assert the attorney-client privilege to protect from disclosure certain communications made in connection with obtaining legal advice. The attorney-client privilege arises from the recognition that, to obtain adequate legal representation, a client must be able to communicate openly and honestly with his or her attorney without fearing unauthorized disclosure of those communications.

A communication is protected from disclosure under the attorney-client privilege if:

- the asserted holder of the privilege is, or has sought to become, a client;
- the person to whom the communication was made is a member of the bar or a subordinate in connection with the communication;
- the communication is or relates to a fact of which the client informed the attorney for the purpose of obtaining legal advice, and not for the purpose of committing a crime; and
- the privilege has not been waived by the client.

To maintain a claim of attorney-client privilege, the communication between the attorney and client must be made and must remain in confidence. The voluntary disclosure of the communication by the client to a third party would result in a waiver of the privilege.

In the case of corporate entities, communications from employees to the corporation's attorneys fall within the attorney-client privilege if the communications concerned matters within the scope of the employees' corporate duties, and took place to assist the corporation in obtaining legal advice.

B. Work-Product Doctrine

The work-product doctrine protects from discovery documents and other materials prepared in anticipation of litigation. Such documents or materials are commonly prepared by an attorney, but the privilege also applies where the preparer is the client/party, or his/her/its consultant, surety, indemnitor, insurer, or agent. This privilege is broader than the attorney-client privilege in that it includes items beyond communications, such as mental impressions or opinions contained in notes. Unlike the attorney-client privilege, however, this privilege is not absolute; it can be overcome by showing a substantial need for the materials and a substantial equivalent of the materials cannot be obtained without undue hardship. The work-product privilege is also subject to waiver by voluntary disclosure.

C. Self-Evaluative Privilege

Companies often prepare internal self-evaluations and reports. Sometimes, the SEC requests the production of these internal self-evaluations as part of its investigation into whether the company violated the securities laws. Because these reports often contain sensitive and self-critical information, companies have attempted to protect these evaluations from production.

Some courts have recognized a qualified privilege over these internal self-evaluations and prevented their discovery by the SEC. However, there is no clear judicial consensus that such a privilege exists, and many courts have found that it does not and required production of the documents. Nor has the Supreme Court recognized the privilege. Thus, companies should generally expect to produce internal self-evaluations to the SEC, although there is some indication the SEC is sympathetic to the policy underlying this privilege, so it might be willing to accept limits on such productions, or agree to enhanced confidentiality.

D. Waiver

As stated above, the attorney-client and work-product privileges can be waived. The SEC, as well as the Department of Justice, consider the voluntary waiver of these privileges as evidence of cooperation, warranting more favorable treatment in SEC enforcement and Department of Justice charging determinations. In addition, there are times when materials otherwise protected by the work-product privilege, such as reports from internal investigations prepared by counsel, could evidence innocence and influence the SEC's decision to end an investigation.

The decision to voluntarily waive privileges must be carefully considered, however, because a voluntary waiver to the SEC, for example, could result in the privilege being waived as to any other legal proceeding or investigation. In other words, if a company intends to cooperate with an SEC investigation by producing material otherwise protected by the attorney-client or work-product privileges, and that company is later investigated by the Department of Justice, it could be determined that the company made a general waiver of the privilege for all purposes. In that case, the Department of Justice would be entitled to receive the otherwise privileged materials.

Courts that have considered this issue of limited and general waivers are divided on the scope of a voluntary waiver and whether it constitutes a general waiver for all purposes. Generally, the issue is resolved in one of three ways:

- the majority view is that a party cannot engage in a "limited" or "selective waiver" of either the attorney-client privilege or work-product doctrine, and that regardless of whether a party attempts or intends such a limited waiver, disclosure will constitute a general waiver with respect to third parties;
- some courts have permitted a waiver of the attorney-client or work product privilege for one limited purpose only; and
- still other courts have intimated that, under certain circumstances, such as if the SEC and a private party have a joint interest or make specific efforts to preserve the confidentiality of the material or information produced, a limited waiver might be permitted.

Considering the foregoing, individuals should weigh very carefully the advantages and disadvantages of waiving the attorney-client and work-product privileges.

VIII. Cooperating With the SEC

The SEC initiated a formal cooperation program in January 2010, to encourage greater cooperation from individuals and companies in the agency's investigations and enforcement actions. Under this program, the Division of Enforcement authorized a variety of new tools, long utilized by traditional law enforcement agencies and proven effective in incentivizing individuals and companies to fully and truthfully cooperate. These new cooperation tools included cooperation agreements, deferred prosecution agreements and non-prosecution agreements, which were added to a kit already featuring the use of proffer agreements. The SEC also streamlined the process for submitting witness immunity requests to the Justice Department for witnesses who have the capacity to assist in its investigations and related enforcement actions. During his tenure with the SEC, the Chair of our Whistleblower Representation Practice served as the first national coordinator of this cooperation program. Our firm also represented the first SEC whistleblower to receive criminal immunity.

A. Proffer Agreements

Proffers of information and evidence by witnesses, including potential cooperating witnesses, are an important method used by the SEC to assess the potential value of information and evidence. A proffer agreement is a written agreement providing that any statements made by a person may generally not be used against that individual in subsequent proceedings (sometimes called "Queen for a day" letters). A significant exception, though, is that the SEC may use the statements as a source of leads to discover additional evidence, which can be used against the proffering individual. Also, the statements can be used for impeachment or rebuttal purposes if the person testifies or argues inconsistently in a subsequent proceeding. In addition, the SEC may share the information provided by the proffering individual with appropriate authorities in a prosecution for perjury, making a false statement or obstruction of justice.

The SEC also sometimes uses a variant tactic called a "reverse proffer" in which it shares implicating key documents and/or expected testimony it has independently collected, in order to demonstrate to a witness why cooperation or settlement is worthwhile.

B. Cooperation Agreements

A cooperation agreement is a written agreement between the Division of Enforcement and a potential cooperating individual or company prepared to provide substantial assistance to an investigation and related enforcement actions. Specifically, in a cooperation agreement, the Division of Enforcement agrees to recommend to the Commission that the individual or company receive credit for cooperating in its investigation and related enforcement actions and, under certain circumstances, to make specific enforcement recommendations. It is important to note, however, that cooperation agreements do not bind the Commission and the Enforcement Division cannot, and does not, make any promise or representation as to whether or how the Commission may act on its enforcement recommendations. Moreover, if the agreement is violated, the staff may recommend an enforcement action to the Commission against the individual or company without any limitation.

Cooperation agreements have been used with some frequency since they became available. Former Enforcement Director Andrew Ceresney reported in a 2015 speech that over 80 had been signed in approximately 5 years. Examples of cases/proceedings in which they have been used include:

- In the Matter of AXA Rosenberg Group LLC, et al. (nondisclosure of a coding error in firm's quantitative investment process);
- a District of New Jersey case, SEC v. Kelley, et al. (reverse merger schemes involving China-based companies);
- SEC v. AgFeed Industries, Inc., et al., Middle District of Tennessee (accounting fraud at animal feed company);
- SEC v. Richard & Susan Olive, Southern District of Florida (fraud on senior citizens in connection with purported charity investments of $75 million);

- SEC v. Volt Information Sciences, Inc., et al., Southern District of NY (revenue recognition scheme);
- SEC v. Abdullah, Southern District of NY (mismanagement of collateralized debt obligations);
- SEC v. Wrangell, Eastern District of North Carolina (Southern Division) (insider trading); and
- SEC v. Serageldin, et al., Southern District of NY (subprime bond pricing scheme during credit crisis).

The SEC has established separate frameworks for assessing the cooperation of individuals and entities. For individuals, the SEC considers: (i) the assistance provided by the cooperator; (ii) the importance of the underlying matter; (iii) the SEC's interest in holding the cooperator accountable; and (iv) the profile of the individual, including their acceptance of responsibility for the misconduct. Four broad measures have also been identified for entities: (i) self-policing prior to the discovery of the misconduct; (ii) self-reporting of misconduct when it is discovered; (iii) remediation; and (iv) cooperation with law enforcement authorities, including providing the SEC with all relevant information.3

A case study of how the SEC assesses cooperation can be found in the litigation release for the above-mentioned In the Matter of AXA Rosenberg Group LLC, et al. proceeding.[4]

C. Deferred Prosecution Agreements

A deferred prosecution agreement ("DPA") is a written agreement between the Commission (not simply the Division of Enforcement) and a potential cooperating individual or company, in which the Commission agrees not to initiate an enforcement action against the individual or company if the individual or company agrees to cooperate truthfully and fully in an investigation and related enforcement actions. The individual or company must also enter into a long-term tolling agreement, which tolls the running of the applicable statute of limitations so that the SEC would not be barred from later bringing an enforcement action should the terms of the DPA be violated. Finally, the individual or company may be required to comply with certain prohibitions or undertakings during a specified period and agree either to admit or not to contest underlying facts that could be asserted to establish a violation of the federal securities laws.

If the agreement is violated during the period of deferred prosecution, the staff investigating the matter may recommend an enforcement action to the Commission against the individual or company for the original misconduct as well as any additional misconduct.

The use of DPAs has been infrequent, with barely a handful announced. Cases and proceedings in which they have been used include:

- SEC v. Uni-Pixel Inc., et al., Southern District of Texas (Houston Division) (misrepresentations to investors about production status and sales agreements for a key product, featuring the first DPA with a corporate director);
- In the Matter of PTC Inc. (the first DPA with an individual in an FCPA matter);
- In the Matter of Hatoum (FCPA violations involving attempted bribes in Qatar); and
- Administrative proceedings against former Regions Bank executives for accounting fraud (misclassification of impaired loans).

There have also been a few DPAs announced in connection with investigations that did not result in a case or proceeding, including DPAs with a former hedge fund administrator, with a non-profit fund for mortgages and construction (the Amish Helping Fund), and with a company called Tenaris S.A. for FCPA violations involving bribes in Uzbekistan.

3 These measures come from a well-known 2001 report issued by the Commission commonly known as the Seaboard Report.
4 Available at https://www.sec.gov/litigation/litreleases/2012/lr22298.htm

D. Non-Prosecution Agreements

A non-prosecution agreement ("NPA") is a written agreement between the Commission and a potential cooperating individual or company providing that the Commission will not pursue an enforcement action against the individual or company. The individual or company must agree to, among other things, cooperate truthfully and fully in the Commission's investigation and related enforcement actions, and comply, under certain circumstances, with express undertakings. If the agreement is violated, the investigating staff retains its ability to recommend an enforcement action to the Commission against the individual or company without limitation.

Even fewer NPAs have been announced than DPAs. Some examples include:

- two companies, Akamai Technologies and Nortek Inc., who promptly self-reported bribes paid to Chinese officials by foreign subsidiaries, cooperated extensively with the ensuing SEC investigations, and took swift remedial measures;
- some tippees in a case about insider trading in advance of eBay's acquisition of GSI Commerce, Inc.;
- Ralph Lauren Corporation in an FCPA case involving bribes to Argentinian government officials;
- Fannie Mae and Freddie Mac, with regard to alleged misleading statements claiming the companies had minimal holdings of high-risk mortgage loans; and
- Carter's Inc., in a case where a former Executive Vice President was alleged to have engaged in financial fraud and insider trading.

E. Grants of Immunity

In certain circumstances, individuals may assert their Fifth Amendment right against self-incrimination and refuse to provide testimony or cooperate unless they receive protection against criminal prosecution. In appropriate circumstances, the SEC may seek statutory immunity or letter immunity to obtain witness testimony. For statutory immunity, the SEC obtains a court order compelling the individual to give testimony or provide other information necessary to the public interest. Such orders will only be issued with the approval of the U.S. Attorney General. In contrast, letter immunity is immunity conferred by an agreement between the individual and a U.S. Attorney's Office.

Both types of immunity prevent the use of statements or other information provided against the individual who provided it in any criminal case, except for perjury, giving a false statement, or obstruction of justice. Statutory and letter immunity only prevents the use of testimony and other information in a criminal prosecution, not an enforcement action. Thus, the SEC may still use the testimony or other information in its enforcement actions, including actions against the individual for whom the immunity order or letter was issued.

IX. Closing an Investigation

A. Wells Process

1. Wells Notice

The SEC sends a Wells Notice to inform individuals or firms of the Commission's intent to bring an enforcement action for the matters under investigation. The Wells Notice indicates that the SEC staff has determined it may bring a civil action against a person or firm, and provides the person or firm with the opportunity to provide information as to why the enforcement action should not be brought. The SEC is not legally required to provide a Wells Notice, yet it is its practice to do so.

Basically, the Wells Notice should inform a person or firm involved in an investigation: (i) that the Division of Enforcement is considering recommending or intends to recommend to the Commission the filing of a civil action or administrative proceeding against such person or firm; (ii) of the specific, potential violations underlying the recommendation; and (iii) that the person or firm may submit arguments or evidence to the Division of Enforcement and the Commission in relation to the matter.

2. Wells Submission

As stated above, a Wells Notice, if provided, must inform the party under investigation that they may make a voluntary submission regarding the proposed recommendation to bring an enforcement action. This voluntary submission is called a "Wells Submission."

The essential purpose of the Wells Submission is to reply to the arguments made by the Division of Enforcement's staff to the Commission as to why an enforcement action should not be initiated. As such, it is critical that counsel preparing the Wells Submission have a thorough understanding of the SEC staff's view of the evidence and the staff's legal theories. This may require face-to-face meetings with the staff. As it is probably the last opportunity to dissuade the SEC from proceeding with its recommendation to file formal charges or final chance to narrow the scope of charges, the Wells Submission requires careful preparation.

The Division of Enforcement staff can reject a Wells Submission if it exceeds the page limit specified in the Wells Notice, or if the Wells Submission is not submitted in time and the staff declines to grant an extension. In addition, if the person or entity making the Wells Submission seeks to limit its admissibility under Federal Rule of Evidence 408 or the Commission's ability to use it, the submission could also be rejected. If a Wells Submission is accepted, the staff will provide it to the Commission along with its recommendation for an enforcement action.

B. Closing Investigations Resulting in an Enforcement Action

If an investigation results in an enforcement action, the investigation cannot actually be closed until all enforcement actions in the case are complete. This requires: (i) a final judgment or Commission order; and (ii) that all ordered monetary relief is accounted for, meaning that all disgorgement and civil penalties have been paid in full (or the Commission has authorized the staff to terminate collection of any unpaid amounts), all funds collected have either been distributed to investors or paid into the Treasury, and all money has been properly recorded.

Further, an investigation cannot be closed if any debts of a defendant or respondent are the subject of collection activity by the Commission or on the Commission's behalf (e.g., by the Department of the Treasury's Financial Management Service or the Department of Justice), or if any funds are being held pending final distribution.

C. Closing Without Further Action

If, after an investigation, the staff decides not to recommend an enforcement action, the investigation will be closed. Generally, the SEC will close an investigation as soon as it is apparent that no further action will be taken. The SEC considers the following factors when deciding whether to close an investigation:

- the seriousness of the conduct and potential violations;
- the staff resources available to pursue the investigation;
- the sufficiency and strength of the evidence;
- the extent of potential investor harm if an action is not commenced; and
- the age of the conduct underlying the potential violations.

Although it is not required to provide notice to the party under investigation that the investigation has been closed, the SEC's policy is to do so via a termination letter.

D. Termination Letters

It is the policy of the Division of Enforcement to notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them. This notification takes the form of a termination letter. A termination letter may be sent before an investigation is actually closed and before a determination has been made as to every potential defendant or respondent.

A termination letter will be sent to anyone who:

- is identified in the caption of a Formal Order;
- submitted or was solicited to submit a Wells Submission;
- asks for such a notice of termination; or
- reasonably believes that the staff was considering recommending an enforcement action against them.

It should be noted, however, that a notice that an investigation has been closed does not necessarily mean that the party has been exonerated or that no action may ultimately be taken.

X. Statute of Limitations in Enforcement Actions

In the civil context, a statute of limitations is a law that bars a claim after a specified period, generally based on the date when the claim accrued. Statutes of limitations require diligent prosecution of claims that are or should be known, in order to foster predictability, accuracy and finality in legal affairs.

A. Governing Statutes

The principal statute of limitations for SEC enforcement actions is set forth in 28 U.S.C. § 2462, which is a "catch all" statute of limitations for actions brought by federal agencies in federal court. Under Section 2462, the SEC has five years to bring an enforcement action seeking civil penalties from the date that the claim first accrued. Enforcement actions based on insider trading violations are governed by the Exchange Act, 15 U.S.C.A. § 78u-1(d)(5), which also sets a five-year limitation.

B. Scope

The above-described statutes of limitations are broadly applicable, and the five years begin to run upon the occurrence of the conduct giving rise to the claim.

An extension may be possible in some cases/on some legal theories, but the availability of extensions in enforcement actions has become highly questionable, and should not be relied on except as a last resort. The legal theories that can support an extension include the continuing violation doctrine, the fraudulent concealment doctrine, and the discovery rule. The continuing violation doctrine operates such that conduct occurring before the limitations period can remain actionable because it is part of a continuing unlawful practice which extended into the limitations period. The fraudulent concealment doctrine may toll a claim where measures are taken (beyond the perpetration of underlying fraud, which by nature is self-concealing) to hinder the prosecution of said claim. And the discovery rule holds that the statute of limitations does not begin to run until a claim is discovered, or could have been discovered with reasonable diligence. However, the Supreme Court recently held in Gabelli v. SEC that the discovery rule does not apply in enforcement actions subject to 28 U.S.C. § 2462, underscoring that the five-year limitation period is best regarded as strict and absolute.

C. Tolling Agreements

A tolling agreement is an agreement between the SEC and a party under investigation for possible securities violations. By signing a tolling agreement, the party under investigation agrees not to assert a statute of limitations defense in a future enforcement action for a specified time period. Tolling agreements are used when the assigned staff investigating potential violations believes that any of the relevant conduct may be outside the five-year limitations period before they will be able to make a fully informed decision on whether to recommend an enforcement action. Tolling agreements can also be included as part of deferred prosecution agreements, in which the SEC agrees not to initiate an enforcement action so long as it receives truthful and complete cooperation (see Section VIII.C., above).

XI. Enforcement Actions and Remedies

The SEC is authorized to bring enforcement actions to punish violations of the federal securities laws. The SEC can do so by either filing a civil action in federal district court, which will be presided over by a federal district judge and subject to the Federal Rules of Civil Procedure and Evidence, or by initiating an administrative proceeding before an administrative law judge.

A. Civil Actions

If the SEC pursues a civil action in federal district court, the SEC may seek, in the event of a successful enforcement action, the following remedies:

1. Civil Injunction

The SEC may obtain a civil injunction prohibiting any person or entity from continuing to violate, and from committing future violations of the federal securities laws. To obtain an injunction, the SEC must show that the person or entity has violated or is about to violate the securities laws, and that there is a reasonable likelihood of future violations. Unlike private litigants seeking injunctive relief, the SEC is not further required to show irreparable injury or that there is no adequate remedy at law. When considering whether to issue an injunction, courts generally look to the following factors:

- the nature of the conduct;
- the degree of scienter (bad intent) involved;
- the defendant's ability to violate the law in the future; and
- the degree to which the defendant has recognized the wrongfulness of his/her/its conduct.

2. Disgorgement

Disgorgement is simply the repayment by the defendant of money obtained as a result of unlawful conduct. It may also include losses avoided as a result of the unlawful conduct. Examples of improperly obtained money subject to disgorgement include: profits made or losses avoided from alleged insider trading; proceeds obtained from illegal securities distributions; or bonuses based upon improperly recognized revenues.

The SEC will also seek—and receive if disgorgement is awarded—prejudgment interest on the disgorged sums.

3. Civil Penalties

The SEC also has the authority to obtain civil monetary penalties from individuals and entities that have violated the securities laws. These penalties are above and beyond any disgorgement that a defendant must pay. The amount of a civil penalty depends upon the nature of the violation and whether the defendant is an individual or an entity.

4. Barring Service as an Officer or Director

Finally, the SEC may obtain an order from the district court prohibiting an individual from serving in the future as an officer or director of a public company. Such orders require a showing of egregious misconduct and are usually sought in circumstances where the individual has misappropriated corporate assets.

B. Administrative Proceedings

Administrative proceedings are proceedings held before an administrative law judge ("ALJ"). Decisions of the ALJ can be appealed to the Commission and to the United States Court of Appeals. The trial is entirely an "in-house" proceeding with far more restricted rights of discovery and of appeal than in a standard civil trial. There are technically different types of administrative proceedings, depending on the types of persons who can be prosecuted under them and the types of sanctions being sought. Practically, however, the SEC will generally invoke authority for all types of administrative proceedings so that it can impose the broadest range of sanctions in one proceeding.

1. Cease and Desist Proceedings

The SEC has the authority under federal law to seek cease and desist orders against public companies and their officers in an administrative proceeding. In these proceedings, the SEC may seek several different types of cease and desist orders, including orders:

- requiring that persons who are violating the securities laws "cease and desist" from continuing the unlawful conduct;
- of "cease and desist" from causing another person's violation of the securities laws;
- compelling disgorgement of ill-gotten gains, as in a civil action, and an accounting to ensure that the disgorgement is accurate;
- requiring affirmative corrective action, such as requiring a corporation to adopt new internal control policies; and/or
- barring association with the securities industry.

2. Civil Monetary Penalties

The SEC may also seek monetary penalties in an administrative proceeding. This authority is limited to proceedings brought under sections 15, 15B-15D, and 17A of the Exchange Act, meaning such penalties are available in administrative proceedings only against registered entities or associated persons. In addition, monetary sanctions can only be imposed upon a finding that the respondent has:

- willfully violated any provision of the federal securities laws (including the rules and regulations thereunder);
- willfully aided, abetted, counseled, commanded, induced, or procured a violation by another person;
- willfully made or caused to be made materially false or misleading statements in a report filed with the SEC; or
- failed reasonably to supervise another person who commits such a violation.

3. Revocation of Licenses and Bars from the Industry

The SEC can also act to suspend or revoke a securities license from any regulated person, and bar a regulated person from working in the securities industry, in an administrative proceeding. Grounds for such sanctions generally involve: willful violations of the securities laws, or willfully aiding and abetting another person's violation; convictions of crimes; and/or failures to supervise others to prevent violations of the securities laws.

4. Proceedings to Correct Filings

The SEC can order a company that is required to make periodic filings under the Exchange Act to issue corrected filings upon finding that previously issued filings contained false and misleading statements.

5. Disciplining Professionals

Finally, the SEC has the authority to discipline lawyers, accountants, and other professionals who practice before the Commission. Specifically, the SEC may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any professional who is found not to possess the requisite qualifications, to have engaged in unethical or improper professional conduct, or to have willfully violated any provision of the federal securities laws.

XII. SEC Cooperation With Other Agencies

A. Parallel Proceedings

The SEC is an independent federal agency charged by Congress with upholding the federal securities laws. The SEC has the authority to bring civil, but not criminal, actions to enforce those laws. The federal securities laws, however, provide for both civil and criminal enforcement. Criminal enforcement is handled by the Department of Justice ("DOJ"), and parallel civil and criminal proceedings for the same illegal conduct are not uncommon. As a matter of public policy and in furtherance of the agency's mission, the SEC staff is encouraged to work cooperatively with criminal investigators. Simultaneous proceedings and investigations can also occur with other federal and state regulatory and law enforcement agencies, and certain self-regulatory organizations.

B. Informal Referrals to Other Authorities

1. Referrals to Criminal Authorities

During the course of inquiries or investigations, the SEC may discover conduct that warrants referral to the DOJ or another criminal law enforcement agency, such as state or foreign criminal authorities. After the informal referral is made, the SEC and the relevant criminal authority will maintain periodic contact and share information where appropriate.

2. Referrals to Self-Regulatory Organizations

Sometimes, SEC staff will determine that it would be appropriate to refer conduct, or the entire matter, informally to one or more SROs. SROs have authority to discipline their own members, including through sanctions. Therefore, the SEC will make efforts to apprise SROs of conduct that violates the rules of the SRO.

3. Referrals to the Public Company Accounting Oversight Board

Under the Sarbanes-Oxley Act, the Public Company Accounting Oversight Board ("PCAOB") is authorized to conduct investigations and impose sanctions against registered public accounting firms. If Division of Enforcement staff comes across conduct that may warrant a referral to the PCAOB, the staff will consult with the Division's Chief Accountant and determine whether an informal referral is appropriate.

4. Referrals to State Agencies

State securities regulators play an important part in regulating the securities industry and protecting investors. In the course of conducting an inquiry or investigation, the SEC staff may determine that it would be appropriate to refer the matter, or certain conduct, informally to state regulators. On occasion, it may be appropriate for the state agency to investigate the matter in lieu of the SEC.

5. Referrals to Professional Licensing Boards

Investigations may reveal conduct that warrants referral to professional licensing boards, such as state bar associations or other state professional boards or societies. Referrals for possible professional misconduct are considered Commission action, but the Commission has delegated authority to make referrals to the SEC's Office of the General Counsel ("OGC").

C. Sharing Information Obtained During Investigations

Generally, information obtained during the course of an SEC investigation is non-public and may not be disclosed without authorization of the Commission. As discussed, however, members of the SEC staff are authorized to engage in discussions with other governmental entities and SROs about non-public investigations.

In addition, these other governmental authorities and SROs can request access to the SEC's investigation files. If such a request is granted, it generally provides access to information already in the SEC's possession, as well as to information acquired in the future. Requests are normally granted unless doing so would: (i) interfere with an ongoing investigation; (ii) be adverse to the SEC's enforcement interest; or (iii) be contrary to the public interest.

When the SEC serves subpoenas or information requests during investigations, it also provides SEC Form 1661 or 1662, which explain how the information that the SEC obtains may be used and state that the SEC can make its files available to other governmental agencies. Thus, recipients of subpoenas or information requests are on notice that information provided to the SEC will be kept confidential only in limited circumstances.

Labaton Sucharow

SEC WHISTLEBLOWER ADVOCATES

In addition to the information contained in this Insider's Guide, we encourage readers to visit our website to review Frequently Asked Questions about the SEC Whistleblower Program, the securities laws enforced by the SEC and our Firm.

Labaton Sucharow LLP
140 Broadway
New York, NY 10005
(212) 907-0700

New York
Washington DC
Chicago
Delaware